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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Petitioners,

v.

LADY BALTIMORE FOODS, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1980 Congress amended the Employee Retirement Income Security Act of 1974 to create withdrawal liability to multiemployer pension plans for employers who cease contributions to such plans. In 1986 Congress enacted a private bill, codified at 29 U.S.C. § 1461(h)(1), as amended in 1989, which purported to eliminate the withdrawal liability of Respondent Lady Baltimore Foods, Inc. (and no other) and thereby cause Petitioner Central States, Southeast and Southwest Areas Pension Fund to refund with interest the amount of withdrawal liability it had collected from Lady Baltimore. This private bill prompts the following constitutional questions:

Whether Congress is empowered under the United States Constitution to enact a private bill under which one private party must give certain of its property to another private party without compensation; and what limits, if any, are provided by the Fifth Amendment?

1. Does § 1461(h)(1) violate the Fifth Amendment's due process and equal protection requirements because in dealing with only two known parties it does not, and was not intended to, further a legitimate public purpose?

2. Is withdrawal liability, that arose when Lady Baltimore Foods withdrew from Central States Pension Fund and for which it received a valid assessment and demand for payment, property whose later taking by § 1461(h)(1) without just compensation is a violation of the Fifth Amendment's takings requirements?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 960 F.2d 1339 and is reproduced as Appendix A, *infra*, pp. 1a-16a. The opinion of the United States District Court for the Northern District of Illinois is reported at 766 F. Supp. 650 and is reproduced as Appendix B, *infra*, pp. 17a-37a.

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[1] The arbitration award is reproduced as Appendix C, *infra*, pp. 38a-57a. The arbitration followed an earlier action between the same parties concerning generally the same issues. The opinion of the first district court is reported at 678 F. Supp. 1323 and is reproduced as Appendix D, *infra*, pp. 58a-71a. The opinion of the court of appeals in that action is reported at 868 F.2d 858 and is reproduced as Appendix E, *infra*, pp. 72a-86a. Citations to the Appendix are hereafter abbreviated as "App. —— at ——."

JURISDICTION

The district court's jurisdiction was invoked under 28 U.S.C. § 1331 and 29 U.S.C. § 1451(c). The jurisdiction of the court of appeals was invoked under 28 U.S.C. § 1291. The judgment of the court of appeals affirming the district court was entered on April 1, 1992. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

APPLICABILITY OF 28 U.S.C. § 2403(a)

This petition draws into question the constitutionality of an Act of Congress; accordingly, 28 U.S.C. § 2403(a) may be applicable. The courts below did not certify this fact to the Attorney General.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

29 U.S.C. § 1381 WITHDRAWAL LIABILITY ESTABLISHED

> (a) If an employer withdraws from a multiemployer plan in a complete withdrawal or partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

(b) For purposes of subsection (a)—

(1) The withdrawal liability of an employer to a plan is the amount determined under section 1391 to be the allocable amount of unfunded vested benefits . . . .

29 U.S.C. § 1382 DETERMINATION AND COLLECTION OF LIABILITY, NOTIFICATION OF EMPLOYER

When an employer withdraws from a multiemployer plan, the plan sponsor, in accordance with this part, shall—

(1) determine the amount of the employer's withdrawal liability,

(2) notify the employer of the amount of the withdrawal liability, and

(3) collect the amount of the withdrawal liability from the employer.

29 U.S.C. § 1383 COMPLETE WITHDRAWAL

(a) For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer—

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

29 U.S.C. § 1393 ACTUARIAL ASSUMPTIONS

The corporation may prescribe by regulation actuarial assumptions which may be used by a plan actuary in determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal liability under this part. Withdrawal liability under this part shall be determined by each plan on the basis of—

(1) actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan, or

(2) actuarial assumptions and methods set forth in the corporation's regulations for purposes of determining an employer's withdrawal liability.

29 U.S.C. § 1399 NOTICE, COLLECTION, ETC., OF WITHDRAWAL LIABILITY

(a) An employer shall, within 30 days after a written request from the plan sponsor, furnish such information as the plan sponsor reasonably determines to be necessary to enable the plan sponsor to comply with the requirements of this part.

(b)(1) As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall—

(A) notify the employer of—

(i) the amount of the liability, and

(ii) the schedule for liability payments, and

(B) demand payment in accordance with the schedule.

* * *

(c)(2) Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b)(1) beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.

29 U.S.C. § 1401 RESOLUTION OF DISPUTES

(a)(1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of—

(A) the date of notification to the employer under section 1399(b)(2)(B), or

(B) 120 days after the date of the employer's request under section 1399(b)(2)(A).

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 1399(b)(1).

* * *

(d) Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 1145).

29 U.S.C. § 1461 EFFECTIVE DATE; SPECIAL RULES

(h)(1) In the case of an employer who entered into a collective bargaining agreement—

(A) which was effective on January 12, 1979, and which remained in effect through May 15, 1982, and

(B) under which contributions to a multiemployer plan were to cease on January 12, 1982,

any withdrawal liability incurred by the employer pursuant to part 1 of subtitle E of this subchapter as a result of the complete or partial withdrawal of the employer from the multiemployer plan before January 16, 1982, shall be void.

STATEMENT OF THE CASE

1. The Parties

Central States, Southeast and Southwest Areas Pension Fund ("Central States") is a multiemployer pension plan within the meaning of Sections 3(2), (35), (37) and 4001(a)(3) of ERISA, 29 U.S.C. §§ 1002(2), (35), (37) and 1301(a)(3).[2] The trustees of Central States are col-

[2] Citations to ERISA will hereinafter be made to its codification at 29 U.S.C. § 1001 *et seq.*

lectively the "plan sponsor" within the meaning of 29 U.S.C. §§ 1002(16)(B) and 1301(a)(10).[3] Lady Baltimore Foods, Inc. ("Lady Baltimore") is a Kansas corporation, which previously made pension fund contributions to Central States.

2. The Statute

Title IV of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1301 *et seq.* was amended by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), which was codified in relevant part at 29 U.S.C. §§ 1381-1451. Under the MPPAA amendments, an employer that withdraws from a multiemployer pension plan is liable to the plan for its share of the plan's unfunded vested benefit liability. The employer's share is called its "withdrawal liability." 29 U.S.C. § 1381. Upon determining that a withdrawal has occurred, the plan sponsor is required to notify the employer, provide a schedule of payments calculated in accordance with the statute and "demand payment in accordance with the schedule." 29 U.S.C. §§ 1382 and 1399(b)(1).

If the employer disputes the plan's determination of a withdrawal or the calculation of liability, the statute provides a two-step review process. First, the employer may request review by the plan itself within 90 days of the initial plan notice. 29 U.S.C. § 1399(b)(2). If the employer still disputes the liability assessment following the plan's review, it may initiate arbitration within 60 days of the plan's response (or, if earlier, 120 days of the request for review). 29 U.S.C. § 1401(a). Within 30 days of the issuance of the arbitrator's final award either party may bring an action in the United States

[3] The following Central States trustees were also parties to the proceeding in the court of appeals: Marion M. Winstead; Robert J. Baker; Howard McDougall; Arthur H. Bunte, Jr.; R.V. Pulliam, Sr.; Robert C. Sansone; R. Jerry Cook; and Harold D. Leu.

district court to enforce, vacate, or modify the arbitrator's award. 29 U.S.C. § 1401(b)(2).

The employer is obligated to commence paying its withdrawal liability immediately upon receiving the pension plan's notice and demand for payment. The liability is payable in installments, 29 U.S.C. § 1399(c)(1), "notwithstanding any request for review or appeal," 29 U.S.C. § 1399(c)(2). These payments must continue through the course of arbitration, with adjustments, if necessary, being made by the arbitrator. 29 U.S.C. § 1401(d).

3. The Proceedings Below

Lady Baltimore was a contributing employer to Central States under the terms of a collective bargaining agreement with Local 955 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Lady Baltimore ceased contributions to the Fund under the terms of that agreement on January 12, 1982, and the Pension Fund determined that this constituted a complete withdrawal within the meaning of MPPAA. By notice dated December 20, 1983, the Fund notified Lady Baltimore that it had incurred withdrawal liability of $216,488.80, payable in monthly installments. This amount was subsequently revised by the Fund to $212,797.92 by letter dated March 26, 1984. Lady Baltimore requested arbitration of its dispute with the Pension Fund on November 16, 1984.

Lady Baltimore did not pay any portion of its liability; therefore on November 1, 1985, the Pension Fund filed suit in the United States District Court for the Northern District of Illinois seeking to compel Lady Baltimore to make its monthly payments of withdrawal liability of $5,001.06, plus past due sums. Lady Baltimore sought relief from Congress from this liability and notified the district court of an amendment sponsored by Senator Dole designed to void Lady Baltimore's (and no other employer's) liability to the Pension Fund. On August 26,

1986, the district court ordered commencement of payments of $5,000.67 monthly.

The Lady Baltimore Amendment, contained in the Tax Reform Act of 1986, Pub. L. 99-514, was enacted on October 22, 1986, and Lady Baltimore immediately moved for summary judgment and for relief from the district court's August 26, 1986 order on the ground that the new provision eliminated Lady Baltimore's withdrawal liability. Lady Baltimore then offered to prove "that the sole purpose of Section 1461(h)(1) was to avoid any withdrawal liability on the part of Lady Baltimore."

On October 30, 1986, the district court granted the Fund's motion for summary judgment for withdrawal liability payments, including past due sums plus interest, costs, and penalties. The court denied Lady Baltimore's motion for summary judgment on the ground that 29 U.S.C. § 1461(h)(1) was unconstitutional. The district court held the Lady Baltimore Amendment to be "pernicious" and a "blatant violation" of substantive and procedural due process. *Robbins v. Lady Baltimore Foods*, 678 F. Supp. 1323, 1328-1330 (N.D. Ill. 1987) (App. D at 68a).

Lady Baltimore appealed the district court's order and the court of appeals vacated the grant of summary judgment against Lady Baltimore on the issue of 29 U.S.C. § 1461(h)(1)'s constitutionality. The court concluded it was unnecessary to reach the constitutional issues where due to an error in drafting the Lady Baltimore Amendment, the date of withdrawal having possibly been misstated, the amendment might not apply to Lady Baltimore. *See Robbins v. Lady Baltimore Foods, Inc.*, 868 F.2d 258, 263 (7th Cir. 1989). (App. E at 83a-84a). Accordingly, the court of appeals remanded the matter for arbitration of the statutory (and certain equitable) questions as required by the statute. *Id.* The court affirmed the district court's award of withdrawal liability pay-

ments, liquidated damages, interest, costs, and attorney's fees to the Pension Fund. *Id.*, App. E at 86a.

In light of this discovery of a flaw in its initial attempt to legislate a litigation outcome favorable to Lady Baltimore, Congress, during the course of Lady Baltimore's arbitration with the Pension Fund, further amended the Lady Baltimore Amendment to fit Lady Baltimore's unique need. *See* Pub. L. 101-239, Title VII, §§ 7822(a), 7894(h)(5) (December 29, 1989). This legislation therefore decided the outcome of the parties' arbitration (as well as the earlier lawsuit). The arbitrator held that 29 U.S.C. § 1461(h)(1) voided the employer's withdrawal liability assessment and ordered the return of all payments with interest including repayment of the liquidated damages and costs that Central States had received pursuant to the earlier district court judgment. (App. C. at 54a-55a.)[4]

The Pension Fund then commenced a new action on May 25, 1990, seeking to vacate the arbitration award. The district court, disagreeing completely with the first district court decision, upheld the constitutionality of the statute. The court also vacated the arbitrator's award, that purported to restore liquidated damages, attorney's fees, and costs, as being unauthorized by statute; but on its own authority the court ordered the return of liquidated damages with interest. The district court also ordered Central States to return the withdrawal liability payments it had received with interest and that each party should bear its own costs and attorney's fees. *Central States Pension Fund v. Lady Baltimore Foods*, 766 F. Supp. 650 (N.D. Ill. 1991) (App. B at 37a).

On June 19, 1991, Central States appealed the district court judgment to the United States Court of Appeals for the Seventh Circuit. On April 1, 1992, the court of

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[4] The arbitrator reserved his decision on Lady Baltimore's equitable defenses. Ultimately Lady Baltimore waived these defenses thus ensuring the finality of the arbitrator's award.

appeals issued its opinion and judgment. The court held the Lady Baltimore Amendment constitutional because it was rational even in the absence of a public purpose and, in any event, the equities of Lady Baltimore's position could supply a public purpose. The court further held that requiring Central States alone to pay Lady Baltimore was not a taking. (The court also reversed the district court's ruling regarding liquidated damages.)

SUMMARY OF REASONS FOR GRANTING THE WRIT

This case questions whether Congress has the power to enact private legislation—that is, legislation that singles out one private entity to confer a private benefit. Must Congress deal with the many, rather than the few (or one); or may the interests of one rise to a level of legitimate public concern? The answer is almost certainly that the Constitution confers no such power on Congress. If, however, in the usual case no one is directly harmed by a private bill, the question may simply be academic and not warrant this Court's attention (as appears to be the case with tax benefits).

This case is fundamentally different, however, because Congress singled out another private entity to alone bear the burden of its largess. If Congress may do that, is any individual safe in possession of its property? The Lady Baltimore Amendment may be the first of its kind, but if upheld, it serves as a model for private bills that cost the government nothing—the perfect constituent service in a time where fiscal restraint is the nominal policy. The constitutional breach is so fundamental and flagrant that this Court should act now to consider this question.

The court below believed that private legislation is the congressional norm and is constitutional. If it had stopped there, the case would easily warrant reversal, but it did not. The court apparently believed that the equities surrounding the Lady Baltimore Amendment also provided a sufficient public purpose to withstand constitutional

muster—both to confer the benefit on Lady Baltimore and to charge Central States for it. But if the equities provide the public purpose, and Congress weighs the equities, then public purpose is simply what Congress says it is and ceases to be a factor in constitutional analysis: there is, then, no private legislation.

The decision of the court below (and the district court) thus serves to simplify (erroneously) constitutional analysis under the Fifth Amendment as well. The traditional formulation of the test for due process and equal protection is whether the challenged legislation bears a rational relationship to a legitimate public (or state) purpose. The test under the analysis below becomes, however, a one-step, rational basis test. Of course this Court has never eliminated the public purpose prong of the test, so the court below was wrong. The line between public and private purpose may be difficult to discern, but that does not mean that it is not there; and if there is any line at all, surely it has been crossed in this case where only two private parties are (intentionally) affected. This court should take this case to reaffirm that legislation without public purpose is unconstitutional.

Even if a public purpose may be found, the Fifth Amendment still requires compensation for Congress' taking Central States' property. The court below thought otherwise for two reasons. First it noted that the interest of Central States is diffuse because the cost is really shared by numerous contributors and beneficiaries (and ultimately, if Central States should fail, the millions of taxpayers). Second it questioned whether withdrawal liability was really property in a consititutional sense. Since Congress could have exempted Lady Baltimore when it wrote the original statute (it believed), then Congress must be able to exempt Lady Baltimore retroactively—particularly where Central States had not reduced its otherwise valid statutory claim to a judgment. This proves too much, however, because it implies that every government benefit can be rescinded retroactively, even in individual cases, provided that the recision is a rational means

toward achieving the equity sought by Congress. Moreover, it is clear that Congress itself regards withdrawal liability as the property of the pension plan recipient. Withdrawal liability must be included in the plan's funding accounts and becomes a necessary component of the plan's assumptions for future funding and contribution levels under the Internal Revenue Code (and the employer gets a tax deduction *when paid*). This Court should take this case to reaffirm the Fifth Amendment's applicability to congressionally created property, and the requirement of just compensation, which the Lady Baltimore Amendment fails to provide.

REASONS FOR GRANTING THE WRIT

May Congress enact a purely private bill whose limited purpose is to require one, known, private entity to surrender its property to another, known, private entity? The court below answered unequivocally that the Constitution permits such bills—at least where the property right at stake was itself created by Congress. If the Seventh Circuit is right, then it has opened a Pandora's box, for Congress may now create general property rights (and burdens) applicable to classes of beneficiaries, and then, as a constituent service, alter those rights and burdens on a case by case basis.

This Court has not struck down economic legislation on due process grounds in decades. The court below believed that this is evidence that there probably is no limit to Congress' economic powers.[5] The Lady Baltimore Amend-

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[5] The conclusion that there are no due process limits on economic legislation has certainly found its way into the case books:

> If one looks only at the outcome of cases challenging economic regulatory legislation under due process, the answer would appear to be that no effective review is undertaken by the Court. No economic regulatory statute has been held invalid under due process since 1937. Only in cases where the Court has been able to find a "taking" of property without just compensation in violation of the taking clause of the fifth amend-

ment tests this hypothesis. May Congress do in an individual case what it unquestionably can do in the general case—shift economic benefits and burdens from one person to another? And if it may, does requiring the private party to bear the cost violate the just compensation clause?

Cases like this must be rare for reported decisions are nonexistent; and this may even be the first such case. We can be sure, however, that it is not the last. Under ERISA alone there must be thousands of employers like Lady Baltimore.[6] If there are limits under the due process clause, this Court should declare them now. Under the Fifth Amendment the right of one individual is as important as that same right enjoyed by many. This Court should not wait for the problem to grow.

I. WHETHER THERE ARE LIMITS ON CONGRESS' POWER TO ENACT PRIVATE LEGISLATION LIKE THE LADY BALTIMORE AMENDMENT IS A QUESTION OF BROAD NATIONAL IMPORTANCE.

This is a deceptively small case, but its implications are great. Congress enacted a broad statute of general application in 1980 creating liability for employers that

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ment or an impairment of contract within the meaning of the contract clause has it invalidated legislation in the economic area.

Barrett, Edward L., Jr., and William Cohen, *Constitutional Law, Cases and Materials*, 7th Ed. (The Foundation Press, Inc. 1985).

[6] Central States has assessed over $1 billion in withdrawal liability against 1,320 withdrawn employers, each of whom resides in or does business in a congressional district, and has collected $330 million (much of it without a final judgment). Thousands of employers are affected in other plans. To date only one other employer has received a special exception (29 U.S.C. § 1461(h)(2)); but others have tried. If this Court lets stand the action below, then what rational employer would not seek similar relief?

contribute to multiemployer pension plans for their proportionate share of the plan's unfunded vested liabilities for pension benefits of all participants.[7] This liability arises only when an employer ceases contributing to (withdraws from) one of these plans. Lady Baltimore incurred liability when it withdrew from Central States, and, faced with a demand for payment (and ultimately a lawsuit) by Central States, Lady Baltimore sought relief from Congress. Congress enacted private legislation purporting to excuse Lady Baltimore (and no other) from its liability to Central States.

If the Lady Baltimore Amendment is permissible fine tuning of MPPAA, as the Seventh Circuit held, is all the withdrawal liability collected over the past twelve years by all multiemployer plans subject to similar fine tuning? The only limit implied by the Seventh Circuit to Congress' power to "give back" the liability was the Article III limit on congressional interference with final judgments. Central States may not yet have had possession of Lady Baltimore's liability when Congress initially acted, but the withdrawal had occurred as had the assessment of liability and demand for payment from Lady Baltimore. Central States was as vested in its rights as, for example, a plan that collected such liability a decade ago. Under the Seventh Circuit's opinion, absent a judgment in its favor, the latter plan is no more secure than Central States and could be required to pay back the liability tomorrow at Congress' whim. In other words, in the Seventh Circuit's view withdrawal liability is really not private property at all, but rather is a public

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[7] Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96-364, 94 STAT 1207 (Sept. 26, 1980). See *Pension Benefit Guaranty Corp. v. R.A. Gray*, 467 U.S. 717, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986).

commodity, assignable (and reassignable) by the grace of Congress.[8]

If the Seventh Circuit is right about withdrawal liability, then is every benefit created by Congress a similar public commodity to be dealt with on the personal level? Having created a minimum wage law, could Congress revoke it with respect to a single, named person—indeed require that person to repay her employer the difference between the minimum wage she was paid and the market value, of her work? If Congress, next term, were to mandate minimum health benefits to be paid by all employers, could it then revoke Mr. Smith's benefit (perhaps he was rich and did not really need it) and require him to repay his company all amounts he had received from it for health benefits?

The Seventh Circuit never explained why withdrawal liability is different, and it is not. If Congress can require Central States to pay Lady Baltimore, then there is no limit on Congress' power to dispense economic favors as the Seventh Circuit essentially ruled. But it was wrong. Our government is founded on the principle of limited government to serve and regulate the public interest. Our Constitution forbids that an individual be singled out by Congress in pursuit of private ends to transfer his wealth to another singled out individual.

From the founding days of the Republic it has been understood that government was formed for the *public* good and could not legitimately serve a strictly private

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[8] The field is ripe with possibilities. We presume that Congress could, if it wished, revoke Lady Baltimore's exemption today and allow Central States to keep the liability. Or, indeed, it might require Central States to pay the liability it collected from Lady Baltimore to third parties (perhaps Lady Baltimore's employees). This kind of fine tuning is less drastic than the Lady Baltimore Amendment and would easily pass muster under the Seventh Circuit's opinion in this case.

purpose. "The notion that governmental authority has implied limits which preserve private autonomy predates the establishment of the American republic." L. Tribe. *American Constitutional Law*, (2d Ed.) at 560. "[Y]et what are many of their most important acts of legislation, but so many judicial determinations, *not indeed concerning the rights of single persons*, but concerning the rights of large bodies of citizens?" J. Madison, *The Federalist*, No. 10 at 57 (The Heritage Press ed., 1945) (emphasis added). A law that "takes property from A and gives it to B" would exceed the proper authority of government even if not "expressly restrained by the Constitution." *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

Yet, the Seventh Circuit, taking the view of a cynic, found Central States' argument wanting because it "implies that a large proportion of . . . routine legislative product of Congress and other legislative bodies . . . is unconstitutional." 960 F.2d at 1342 (App. A at 6a). Central States is not so cynical about the present, but if Congress is unchecked, as the Seventh Circuit held, then its characterization of congressional work product may well fit the future.[9]

This Court should issue a writ of certiorari to the Seventh Circuit to clarify the role of Congress and the limits upon it in enacting private legislation. Specifically this Court should consider whether Congress exceeds its powers under Article I when it enacts legislation lacking in public purpose, as it did here, and in particular when it singles out one known entity to pay the price.

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[9] The Framers would surely be surprised to see our government as the vehicle for a return to a Hobbesian state of nature, substituting congressional clout for brute force even to the level of purely private interests.

II. THE COURT OF APPEALS DECISION IS IN CONFLICT, AT LEAST IN PRINCIPLE, WITH THE DECISIONS OF THIS COURT, WHICH REQUIRE A PUBLIC PURPOSE TO UNDERLIE VALID LEGISLATION.

In light of the public purpose premise underlying Congress' constitutional powers, it should not be surprising that the Constitution does not provide an express limitation on congressional action to take property from a private entity for the private interests of another. Such restrictions would be unnecessary because the Framers need not deny Congress a power it would not otherwise have. The Bill of Rights, however, is an insurance policy lest Congress forget, and the public purpose requirement is amply reflected in this Court's decisions under it. In particular, this Court has held that a legitimate public (or state) purpose is a fundamental necessity for legislation to withstand scrutiny under the Fifth Amendment for due process and equal protection; and if a public purpose is found a taking must still be compensated.

A. Due Process Implies A Public Purpose.

Over fifty years ago this Court noted that "one person's property may not be taken for the benefit of another private person without a justifying public purpose . . . ." *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 79, 57 S.Ct. 364, 376, 81 L.Ed. 510 (1937). The Seventh Circuit, on the other hand, held below that it was "bound by precedents that impose an extraordinary and perhaps insuperable burden on an individual or firm that challenges the constitutionality of a statute merely because it lacks any perceptible connection to a tenable conception of the public welfare." 960 F.2d at 1343 (App. A at 7a). The Seventh Circuit has misperceived the precedents, for this Court has never so held.[10]

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[10] Ironically the case that the Seventh Circuit believes most recently imposes the "extraordinary burden" also notes the very

If the Seventh Circuit had left the matter there, it would be quite clearly wrong in light of *Thompson* and innumerable other cases of this Court. Having held that the Lady Baltimore Amendment needed no public purpose, the Seventh Circuit nonetheless sought one. "Certainty is desirable but equity has its claims too." App. A at 8a. But if the Seventh Circuit believes that a desire to do equity on an individual level for Lady Baltimore is a legitimate public purpose (it is not), it still has not answered the question of whether requiring Central States alone to pay Lady Baltimore is a legitimate extension of that public purpose.[11]

> [T]he case for due process protection grows stronger as the identity of the persons affected by a governmental choice becomes clearer; and the case becomes stronger still as the precise nature of the effect on each individual comes more determinately within the decision maker's purview. For when government acts in a way that singles out identifiable individuals—in a way that is likely to be premised on suppositions about specific persons—it activates the special concern about being personally *talked to* about the decision rather than simply being *dealt with*.

O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 801, 100 S.Ct. 2467, 2483, 65 L.Ed. 506 (1980) (Blackmun, J. concurring) (quoting L. Tribe, *American Con-*

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limit that the Seventh Circuit supposes is not there. "[T]he deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that . . . [the] statute is supported by a legitimate legislative purpose . . . judgments [remain with the legislature.]" *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729, 104 S.St. 2709, 2717-18, 81 L.Ed.2d 601, 611 (1984).

[11] In any event it is difficult (indeed impossible) for Central States to see how equity on a case by case basis can ever satisfy the public purpose requirement no matter how compelling the equities might seem. Requiring legislation to serve the many provides an important, and self-policing, check on abuses of congressional power.

stitutional Law, § 10-7, pp. 503-504 (1978) (emphasis in original). When Congress deals with groups, it may be that "Congress' " purpose is the "public" purpose, the terms forming a tautology, and the purpose may even be presumed legitimate. But where Congress deals with known individuals, the legitimacy of its purpose should automatically be suspect. Invocation of individual equity as a public purpose does not make it a legitimate legislative purpose just because Congress said so and thus does not salvage the Seventh Circuit's opinion from a conflict with this Court's decisions.[12]

As if to lower the public purpose threshold to fit the meager offering of the Lady Baltimore Amendment, the Seventh Circuit suggests that Central States is entitled to less protection than individuals or a "normal firm" under similar circumstances. 960 F.2d at 1344 (App. A at 10a). The Seventh Circuit does not explain why Central States, whose losses (it notes) are spread among many participants and employees, and its government

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[12] Nor does the supposed rationality of this legislation salvage a public purpose, as suggested by the court below. 960 F.2d at 1343-49 (App. A at 8a-9a). Rationality and public purpose are separate and distinct prongs of the test. *R.A. Gray, supra.* (The district court erroneously equated the two.) We note, however, that the Seventh Circuit suggests that Lady Baltimore might fail the rationality test if similarly situated employers received no benefit. *Id.* Since virtually any employer that contributes for fewer than 10 years (the minimum period for vesting under Central States) will pay more in contributions than its employees earn in benefits, there must have been hundreds of similarly placed employers in Central States alone. And indeed this Court has recently granted a petition for certiorari to decide whether imposing withdrawal liability on such employers constitutes an "as applied" violation of the Due Process Clause. *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, No. 91-904 (U.S.) (pet. granted May 26, 1992). The Court may wish to grant this petition in order to ensure consistency between *Lady Baltimore* and *Concrete Pipe*. In any event this Court should take notice from *Concrete Pipe* that Lady Baltimore's situation was far from unique.

agency insurer, is less deserving of constitutional protection than a corporation, whose losses are spread among many shareholders and its insurers. Likewise, the Seventh Circuit does not explain, but apparently believes, that withdrawal liability is not like "real" property, but was created with implicit congressional strings to be pulled back at will.

Regardless of the Seventh Circuit's rationalizations, the fundamental point is still that the Lady Baltimore Amendment lacks a public purpose both in granting the benefit to Lady Baltimore and in imposing the burden uniquely on Central States. Such legislation violates the due process clause under this Court's decisions but not under the Seventh Circuit opinion. This Court should issue the writ of certiorari to correct the Seventh Circuit's error.

B. The Seventh Circuit Opinion Is In Conflict With This Court's Equal Protection Decisions.

Closely related to substantive due process, the equal protection guarantee of the due process clause requires "that the classification challenged be rationally related to a legitimate state interest." *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976). As we have argued, the Lady Baltimore Amendment lacks a legitimate state interest, so would fail the *Dukes* test. Nonetheless the Seventh Circuit let the amendment stand—a clear conflict with *Dukes*.

Moreover, the Lady Baltimore Amendment has not created rational classes in dealing with the perceived problem. A typical collective bargaining agreement extends for three years. Thus, virtually every contributor to Central States (and other multiemployer plans) as of the date of MPPAA's enactment could, like Lady Baltimore, foresee the termination of its contractual obligation to contribute by 1983 unless it was further (voluntarily) extended. Lady Baltimore could have avoided

its withdrawal by extending its contract. That it chose not to do so does not set it apart as a special class and does not rationalize the statute. Nor is Central States unique among pension plans warranting its being singled out to repay Lady Baltimore while other plans keep the withdrawal liability they collected. See, *e.g.*, *Concrete Pipe*, *supra*, No. 91-904 (pet. granted May 26, 1992).[13] Yet Congress provided no general benefit for employers situated like these and many others, choosing to single out Lady Baltimore alone to enjoy its largess. Not surprising, the only legislative history regarding the Lady Baltimore Amendment condemns it:

> The Lady Baltimore amendment is in my opinion, unconstitutional. It applies to only one company. It interferes with the workings of the judicial branch. And it attempts to overturn a final judgment in favor of one private party so as to benefit another private party.

135 Cong. Rec. S.16660 (daily ed., Nov. 21, 1989) (remarks of Senator Metzenbaum). Congress created a special benefit for Lady Baltimore that other similarly situated companies did not receive, and singled out Central States alone to pay it. This is neither public nor a rational means to public purpose.

C. The Seventh Circuit's Opinion Is In Conflict With This Court's Taking Clause Decisions.

This Court has held that "the constitution forbids even a compensated taking of property when executed for no reason other than to confer a private benefit on a particular private party." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245, 104 S.Ct. 2321, 2133, 81

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[13] See note 12, *supra*. The equities in favor of Concrete Pipe whose employees earned no vested benefits would seem stronger than Lady Baltimore, whose employees earned vested benefits, yet Congress enacted no special provision for it. Lady Baltimore was singled out for special treatment not accorded similarly situated employers without a conceivable rational basis. If this Court upholds the statute in *Concrete Pipe* then surely it should strike down the Lady Baltimore Amendment.

L.Ed.2d 186 (1984). The Seventh Circuit's Opinion squarely conflicts with *Midkiff* if there is no public purpose to the Lady Baltimore Amendment. Of course, the Seventh Circuit erroneously believed that the Lady Baltimore Amendment does not "quite" lack a public purpose. Even if so, the taking of Central States' withdrawal liability is unconstitutional for want of just compensation as required by the Fifth Amendment.

In a case closely analogous to Lady Baltimore this Court has held a creditor's interest in a state law created registry deposit was a property interest, even though the claim, presumably, was not liquidated.

> We, of course, also accept the further proposition . . . that '[p]roperty interests are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . .' *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L.Ed.2d 548 (1972).

Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 162, 101 S.Ct. 446, 451, 66 L.Ed.2d 358 (1980). In *Webb's* this Court distinguished "a mere unilateral expectation" from the registry deposit that it held was property.

> It was property held only for the ultimate benefit of Webb's creditors, not for the benefit of the court and not for the benefit of the county. . . . Eventually, and inevitably, that fund, less proper charges authorized by the court, would be distributed among the creditors as their claims were recognized by the court.

Id. As in *Webb's*, withdrawal liability of Lady Baltimore was held for the benefit of Central States, not Congress. And like *Webb's*, withdrawal liability is a property interest even though not yet reduced to judgment by a court. The Seventh Circuit's ruling to the contrary is clearly in conflict with *Webb's*.

The court below may erroneously have believed that Central States lacked property rights in the Lady Balti-

more withdrawal liability because Central States' rights had not been reduced to a final judgment prior to the legislation. While a judgment may vest rights that did not previously exist, thus creating a new property interest for purposes of the just compensation clause, it is certainly not the only means. Among the many independent sources of property rights, see *Webb's, supra*, is federal legislation. In this case, 29 U.S.C. § 1381 created Central States property interest in Lady Baltimore's withdrawal liability upon Lady Baltimore's withdrawal. Lady Baltimore withdrew in 1982 and Central States assessed it in 1985 before there was a Lady Baltimore Amendment. Central States sought the assistance of the courts solely in enforcing its rights to this property, not in creating them.

The court below apparently thought that Central States' rights to the withdrawal liability were only contingent because the arbitrator had not yet ruled when the Lady Baltimore Amendment was passed. This is correct only in the broadest sense that claims to property ultimately may be held to be unsound. But this does not make the claim contingent. Here Central States correctly assessed Lady Baltimore. Central States need not have, and did not, invoke an arbitration to establish its claim. Lady Baltimore invoked arbitration in an attempt to overturn Central States' claim.

Moreover, it is worth noting that withdrawal liability is not treated as contingent by the Internal Revenue Code. Under 26 U.S.C. § 412(b)(3)(A) and (b)(7)(A) withdrawal liability is a credit to the funding standard account of a pension plan when paid, and under 26 U.S.C. § 404(a)(3) the employer may take an immediate tax deduction upon paying. And pension plans like Central States must accurately base their level of benefits and required level of contributions on assumptions regarding the availability of income, such as withdrawal liability. See, generally 26 U.S.C. § 412 and 29 U.S.C. § 1393.

If withdrawal liability is an unreliable contingency, available for congressional disposal, then Central States alone may have miscalculated its needs from contributing employers by hundreds of millions of dollars. When the Lady Baltimore Amendment was enacted, whether in 1986 or in 1989, it rescinded a property right that already existed.[14] Compensation was thus required by the Fifth Amendment.

CONCLUSION

The decision below is an abdication of judicial oversight of Congress' powers of economic legislation, holding those powers effectively unrestrained by the Fifth Amendment. This court should grant the writ of certiorari. The Seventh Circuit should be reversed.

Respectfully submitted,

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[14] The parties and the courts below all seem to agree that the 1986 amendment, as a result of poor wording, failed to cover Lady Baltimore under its literal language. Central States in 1987 acquired a judgment enforcing the immediate payment obligation of Lady Baltimore. The 1989 amendment was properly drafted. The court below seemed to believe that it was significant whether the first amendment was nevertheless effective, and ruled that it was. For Fifth Amendment purposes the timing of any amendment, at least after Lady Baltimore withdrew and was assessed, is probably irrelevant. Thus the Seventh Circuit's point (incorrect) than the 1986 amendment was effective is obscure.

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 91-2414, 91-2617

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Plaintiffs-Appellants,
Cross-Appellees,
v.

LADY BALTIMORE FOODS, INC.,
Defendant-Appellee,
Cross-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 90 C 3007—Paul E. Plunkett, *Judge.*

ARGUED FEBRUARY 21, 1992—DECIDED APRIL 1, 1992

Before POSNER and MANION, *Circuit Judges*, and VAN SICKLE, *Senior District Judge.**

POSNER, *Circuit Judge.* A pension fund, Central States, brought this suit against an employer, Lady Baltimore Foods, for withdrawal liability under the Multiemployer

* Hon. Bruce M. Van Sickle of the District of North Dakota, sitting by designation.

Pension Plan Amendments to ERISA (the federal pension law). 29 U.S.C. §§ 1381 *et seq.* See generally *Central States, Southeast & Southwest Areas Pension Fund v. Slotky*, No. 90-3546 (7th Cir. Feb. 24, 1992); *Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d 1247, 1251-56 (7th Cir. 1983). Behind withdrawal liability lies concern that if an employer who has workers with vested pension rights could withdraw from a multiemployer pension fund without any liability to the fund, the burden of honoring those vested rights would be shifted to the other employers covered by the fund. Withdrawal liability is heavy; so, fearing that the enactment of the Multiemployer Pension Plan Amendments Act would precipitate a rash of withdrawals from ERISA pension plans, Congress made the Act (enacted in September 1980) retroactive. Any present or former employer of workers who had obtained vested pension rights while employed by that employer was subject to withdrawal liability even if the rights had vested before 1980, unless the employer had withdrawn from the plan before the effective date of the Act—which was in April 1980, some five months *before* the Act was passed. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986). The backdating of the effective date was later eliminated—but that gets us ahead of our story.

Not having withdrawn from the Central States pension plan by the deadline, Lady Baltimore was caught in the net spread by the Act. It withdrew in 1982 (pursuant to the collective bargaining agreement that it had signed in 1979)—much too late—and the following year Central States assessed a withdrawal liability against it of more than $200,000, even though Lady Baltimore had, since joining the plan in 1964, contributed more than $250,000 to it and only a handful of its employees had retired with vested benefits. It has been stipulated that "As of June 1, 1985, the present value of Lady Baltimore's 1964 to 1982 contributions to the Fund exceeded the pres-

ent value of what the Fund will likely be required to pay to Lady Baltimore employees [former as well as present employees] by $257,780.00."

Lady Baltimore made a timely request to arbitrate its withdrawal liability but did not pay the assessment, so Central States filed suit in 1985, seeking "interim payments," which is to say installments of the assessment while the arbitration proceeding was going on. The following year the district court ordered Lady Baltimore to comply with the pension fund's demand for interim payments. This was a proper order. The Multiemployer Pension Plan Amendments Act provides that disputes over withdrawal liability shall be resolved by arbitration and that the employer may not defer payment pending arbitration. 29 U.S.C. §§ 1399(c)(2), 1401(a). If he wins the arbitration he will get back whatever he has paid but the rule is pay first, arbitrate after. *Robbins v. Lady Baltimore Foods, Inc.*, 868 F.2d 258, 264 (7th Cir. 1989); *Robbins v. Pepsi-Cola Metropolitan Bottling Co.*, 800 F.2d 641 (7th Cir. 1986) (per curiam).

While litigating in the district court, Lady Baltimore was also pursuing legislative remedies and in 1986 it managed to get passed an amendment to the Tax Reform Act of that year which stated that "in the case of an employer who entered into a collective bargaining agreement" that was effective on and until specified dates "any withdrawal liability incurred by the employer . . . as a result of the . . . withdrawal of the employer from the multiemployer plan before January 12, 1982, shall be void." 29 U.S.C. § 1461(h). The only employer intended to be affected by this amendment was Lady Baltimore, which had been a party to a collective bargaining agreement that was effective on and until the specified dates and which had withdrawn from the multiemployer plan on January 12, 1982. This exemption from the Multiemployer Pension Plan Amendments Act was sponsored by Senator Dole of Kansas, then the Senate Majority Leader, and cospon-

sored by Kansas's other senator. Lady Baltimore is a Kansas enterprise. The amendment contained, however, a slip of the pen. Lady Baltimore had withdrawn from the multiemployer plan on January 12, which, of course, was not before January 12. Cf. *United States v. Locke*, 471 U.S. 84 (1985).

At first this was not noticed or at least no significance was attached to it. Instead when Lady Baltimore interposed the amendment as a defense in the district court suit, the judge held that the amendment was unconstitutional (primarily as a denial of substantive due process) and entered a final judgment in favor of Central States for withdrawal liability. *Robbins v. Lady Baltimore Foods, Inc.*, 678 F. Supp. 1323 (N.D. Ill. 1987). Later he added an award of liquidated damages and of attorneys' fees. "Liquidated damages" under the Multiemployer Pension Plan Amendments Act are a penalty (equal to 20 percent of withdrawal liability) imposed on employers such as Lady Baltimore that refuse to pay after receiving the notice of assessment, as they are supposed to do even if they dispute the assessment and so take it to arbitration. 29 U.S.C. § 1132(g)(2)(C)(iii); *Carpenters & Joiners Welfare Fund v. Gittleman Corp.*, 857 F.2d 476 (8th Cir. 1988); *United Retail & Wholesale Employees, Etc., Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128, 144 (3d Cir. 1986), aff'd, 481 U.S. 735 (1987); *Banner Industries, Inc. v. Central States, Southeast & Southwest Areas Pension Fund*, 663 F. Supp. 1292, 1295 n. 3, 1300 n. 10 (N.D. Ill. 1987).

Lady Baltimore paid the judgment but appealed to this court, which reversed. 868 F.2d 258 (7th Cir. 1989). Being loath to decide a constitutional issue unnecessarily, we held that the issue of the constitutionality of the amendment was premature. The district court had failed to consider not only the possibility that because of the slip of the legislative pen the amendment did not apply to Lady Baltimore but also such equitable defenses as

the company might have to the assessment of withdrawal liability. We remanded the case with instructions that the dispute over that liability be referred to arbitration. The case went to arbitration and in 1989, while it was in progress, Congress passed an amendment to the Lady Baltimore amendment, changing "before January 12" to "before January 16." On the strength of this change the arbitrator held that Lady Baltimore had no withdrawal liability and he ordered the pension fund to repay the interim withdrawal payments that Lady Baltimore had made pursuant to the district judge's order, together with the liquidated damages and attorneys' fees that Lady Baltimore had also paid. Central States then filed a new suit—this suit—attacking the arbitrator's award. The district judge agreed with the arbitrator that Lady Baltimore had no withdrawal liability and should not have to pay Central States' attorneys' fees. But he ruled that Central States had to return the liquidated damages and that Lady Baltimore was not entitled to an award of attorneys' fees despite its success in defeating withdrawal liability. 766 F. Supp. 650 (N.D. Ill. 1991). Both parties appeal.

Central States argues with great but unavailing energy that the Lady Baltimore amendment in its perfected, 1989 form (the original amendment may have been inadvertently inapplicable to Lady Baltimore—though we think not, for reasons explained later) violates a host of constitutional provisions because, to begin with, it has no valid public purpose. It is a naked redistribution and therefore a taking, a denial of equal protection, and a violation of "substantive" due process. A powerful senator did a favor for a constituent that involved taking money out of the pocket of Central States and giving it to Lady Baltimore. There is no preamble or legislative history or other indication that the Lady Baltimore amendment was intended to serve any more capacious concept of social welfare than that what is good for a Kansas man-

ufacturer is good for the nation and let the devil take the hindmost.

We are troubled by this argument because it implies that a large proportion of what had seemed to us the routine legislative product of Congress and other legislative bodies in this country is unconstitutional. It is a long time since American government operated on the principle that that government governs best which governs least. Much modern legislation involves targeting government largesse on politically influential groups and the burdens of government on politically impotent ones. Not infrequently the legislation benefits a tiny handful of individuals or firms or even a single firm—the latter is especially common in tax legislation, see, e.g., *Prussner v. United States*, 896 F.2d 218, 227 (7th Cir. 1990) (en banc), where the Lady Baltimore amendment would be entirely at home. Maybe that's why it was tacked on to the aesopically named Tax "Reform" Act. Stanley S. Surrey, "The Congress and the Tax Lobbyist—How Special Tax Provisions Get Enacted," 70 *Harv. L. Rev.* 1145 (1957). It is true that most of this special-interest legislation cannot be attacked in federal court because of the rule that denies federal taxpayers standing to challenge legislation that injures them only by increasing their taxes. *Frothingham v. Mellon*, 262 U.S. 447 (1923). But that is a matter of remedy rather than of right. It would be odd to suppose, as Central States' argument inescapably implies, that the characteristic output of democratic politics is unconstitutional (albeit not challengeable), although the Constitution is thought in some quarters to require that conclusion. See, e.g., Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985).

It is true that the cases keep saying, in a dim echo of the "liberty of contract" jurisprudence that gave us *Lochner* and was repudiated in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), that even legislation which does not deal with currently sensitive subjects such as

race must be "rational" to survive challenge under equal protection and cognate notions. See *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam), and other cases cited in *Pontarelli Limousine, Inc. v. City of Chicago*, 929 F.2d 339, 342 (7th Cir. 1991). But when we asked Lady Baltimore's lawyer what set of circumstances might make such a thing as the Lady Baltimore amendment irrational and therefore invalid, he could suggest none. He plainly believes, though without being quite willing to admit it, that merely "economic" regulations can never flunk the test of rationality. He may be right. They may of course flunk other constitutional tests, including some drawn from the equal protection clause. The Supreme Court continues to invalidate discriminatory state taxes. *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336 (1989). But the immediate question is whether such regulations can ever flunk the rationality test. Perhaps the Supreme Court will change course on this subject once more but for now we are bound by precedents that impose an extraordinary and perhaps insuperable burden on an individual or firm that challenges the constitutionality of a statute merely because it lacks any perceptible connection to a tenable conception of the public welfare. Which the Lady Baltimore statute does not lack—quite. The imposition of withdrawal liability, fairly describable as draconian, by the Multiemployer Pension Plan Amendments Act was made retroactive for perfectly good reasons, but the effect nonetheless was to impose hardship on a number of individual firms of which Lady Baltimore, for all that Central States has been able to show, was one. In Lady Baltimore's case, not only was the imposition of this liability retroactive (and it was: Lady Baltimore did not, it is true, withdraw until well after the passage of the Act; but because the Act's effective date was backdated, Lady Baltimore, if it missed that deadline, would presumably have thought it too late to try to beat withdrawal liability by withdrawing). In addition the liability itself appears to be, if we may judge

from the stipulation quoted earlier, wholly disproportionate to the cost—quite possibly zero—that the withdrawal imposed on the pension fund. Either through lack of foresight or out of a desire to have a completely mechanical algorithm for computing liability regardless of the inequities produced thereby—a fair or at least plausible description of the pertinent statutory provision, 29 U.S.C. § 1391—Congress in the Multiemployer Pension Plan Amendments Act failed to create an exemption for such a case. So Lady Baltimore went to Congress and asked for and got some fine-tuning.

Certainty is desirable but equity has its claims too. We could not pronounce the adjustment in liabilities brought about by the Lady Baltimore amendment irrational in a constitutional sense unless conceivably we were pointed to other employers in the identical situation as Lady Baltimore yet stuck with withdrawal liability. That would be a test case of the continued vitality of the rationality standard in the sphere of economic regulations. But Central States points to no employers comparable (let alone identical) to Lady Baltimore yet subject to withdrawal liability. If a statute of general application fits all firms within its scope but one, the exemption of that one would not be irrational. We cannot say that this is not the case here, because Central States has offered no evidence or even argument to make us think otherwise and also because Lady Baltimore was not the first firm to win a congressional reprieve from withdrawal liability. By section 558(a) of the Deficit Reduction Act of 1984, Congress eliminated withdrawal liability for employers who had withdrawn from ERISA plans between April and September 1980. And later it allowed employers who were parties to binding withdrawal agreements to escape withdrawal liability even if their withdrawal had not taken effect until the end of 1980. See historical note to 29 U.S.C. § 1381. These enactments—which while eliminating the most conspicuous retroactive feature of the Act failed to benefit Lady Baltimore because it had withdrawn

from its ERISA pension plan after 1980—suggest that Lady Baltimore has a claim for relief that goes beyond friendship with powerful legislators. For all we know it is the only employer to have fallen through the cracks in the amendatory legislation, the validity of which is not questioned. To say that Congress cannot honor an equitable claim for exemption from a harsh law merely because it is the claim of only one firm—that a federal statute cannot have but one beneficiary—would be tantamount to ruling private bills unconstitutional, a step that we are naturally reluctant to take, especially without being asked to take it. See generally Note, "Private Bills in Congress," 79 *Harv. L. Rev.* 1684, 1685-88 (1966); William N. Eskridge, Jr. & Philip P. Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 398 (1988).

Furthermore, the interference with economic freedom here—the interest that underlies the "liberty of contract" jurisprudence that Central States' complaint evokes—is not the exemption of Lady Baltimore from the Multiemployer Pension Plan Amendments Act; it is the Act itself. The Act expanded the reach of the federal pension law, itself a dramatic interference with the economic freedom of employers and employees, and did so in a way arguably in violation of the due process and taking clauses, though the Supreme Court held otherwise in the *Gray* and *Connolly* cases cited earlier in this opinion. Not the Act, but the amendment to the Act exempting Lady Baltimore, does homage to liberty of contract. It restores contractual rights infringed by the Act that it amended. We canont divine what constitutional policy would be furthered by invalidating the amendment.

Central States is on stronger ground when it emphasizes not the singling out of one company for an exemption from general legislation but the placing of the entire cost of that exemption on a single company. When Congress passes a typical piece of "porkbarrel" legislation the costs

are spread among the whole federal taxpaying public and the injury to the individual taxpayer is thus infinitesimal, although this is to take rather a myopic view since the burden of the totality of such legislation on the individual is great. Here Congress has said in effect that Central States must fund the exemption for Lady Baltimore—the Lady Baltimore "bailout"—all by itself.

In fact Central States is nothing like an individual. It isn't even much like a normal firm. It is a nonprofit entity composed of hundreds of individual employers who in turn employ in the aggregate many thousands of workers. Any loss to Central States will be spread among this large group of firms and workers, with the Pension Benefit Guaranty Corporation and ultimately the federal taxpayer in the background to insure the vested pension rights of participants in Central States' plans. But forget this and consider Central States as if it were a single entity in every practical sense. Then we have Congress's telling Central States to make a refund to Lady Baltimore rather than Congress's bailing out Lady Baltimore itself.

This sounds worse than it is. Suppose the Lady Baltimore amendment had been part of the original Multiemployer Pension Plan Amendments Act. The impact on Central States would have been the same. The reason that if the amendment is upheld Central States must write a check to Lady Baltimore rather than merely be unable to collect withdrawal payments from it is that in the middle of the judicial proceedings Lady Baltimore decided to pay the district court's judgment for interim withdrawal payments and liquidated damages, rather than seek a stay pending the appeal that it ultimately won in great part. It should not be punished for that decision, which in any event is irrelevant to whether the amendment should be struck down as a naked redistribution.

That decision to pay in 1988 may have an additional significance, however. A judgment that has become final through exhaustion of all appellate remedies is a property

right, *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1856); *McCullough v. Virginia*, 172 U.S. 102, 123-24 (1898); *Hodges v. Snyder*, 261 U.S. 600, 603 (1923); *Tonya K. by Diane K. v. Board of Education*, 847 F.2d 1243, 1247-48 (7th Cir. 1988), which Congress could not take away without paying just compensation—perhaps (at least in this case) could not take away at all, either because the taking in this case has no public use, or because it invades the judicial power of the United States, which Article III of the Constitution confides to the federal courts exclusively. *United States v. O'Grady*, 89 U.S. (22 Wall.) 641, 647-48 (1875); *Tonya K. by Diane K. v. Board of Education*, *supra*, 847 F.2d at 1247. Central States points out that the district court's judgment in its favor in 1988 was affirmed by this court the following year and, so far as the interim payments and liquidated damages and attorneys' fees are concerned, became final then (or shortly afterward) since neither party attempted to take the case to the Supreme Court. It became final, moreover, several months before the 1989 amendment to the original Lady Baltimore amendment finally succeeded in taking the company out of the Multiemployer Pension Plan Amendments Act. So Congress is trying to take away a final judgment, and to do so without compensation.

This argument fails on two grounds. The first is that the original Lady Baltimore amendment was, despite its botched drafting, applicable to Lady Baltimore and thus canceled the company's withdrawal liability well before any final judgment was entered. It is true that the Supreme Court has on occasion, notably in *United States v. Locke*, *supra*, given a literal reading to a statute containing an obvious mistake in drafting. But the general rule honored even by interpretive literalists is that if a literal reading would produce an absurd result the interpreter is free (we would say compelled) to depart in the direction of sense. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring); *Burns*

v. United States, 111 S. Ct. 2182, 2186-87 (1991) (opinion for the Court, by author of *Locke*); see also *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 453-56 (1989), and cases cited there; *id.* at 470 (Kennedy, J., concurring). The rule is not limited to garbled language. Rule 609 (a) (1) of the Federal Rules of Evidence, construed in the *Green* case, is a perfectly straightforward, flawlessly grammatical, syntactically impeccable prose specimen. But the Supreme Court, quoting (490 U.S. at 511) this court's remark that the rule "can't mean what is says," *Campbell v. Greer*, 831 F.2d 700, 703 (7th Cir. 1987), interpolated "criminal" before "defendant" so that the rule would not create an arbitrary disparity between the rights of cross-examination of civil plaintiffs and of civil defendants. It is plain, and indeed conceded and even emphasized by Central States itself—which so far as we are aware coined the term "Lady Baltimore amendment" to describe the original as well as the amended provision of the Tax Reform Act—that the original amendment would be a nullity were it not interpreted to apply to Lady Baltimore, since there is no other entity to which it could have applied.

We understand the case for literal or strict construction. Literalism is easy—to easy—to deride, because it misdescribes communication. Suppose the president of Lady Baltimore told his assistant that he was convening a meeting at which there would be a number of smokers and the assistant should fetch for it all the ashtrays he could find, and the assistant complied by ripping some ashtrays off the walls and stealing others. (The example is from Gerald MacCallum, "Legislative Intent," in *Essays in Legal Philosophy* 237, 256-57 (Robert S. Summers ed. 1968).) The assistant's literalism would get him fired. The literalists of statutory interpretation know all this. Their concern is political rather than epistemological or hermeneutic. They are worried that the gauntlet that the Constitution requires bills to run before they become law will be bypassed if judges give heed not just to the enactment itself but to what individ-

ual members of Congress said about it, perhaps in a deliberate effort to influence judicial interpretation. *Continental Can Co. v. Chicago Truck Drivers, Etc., Pension Fund*, 916 F.2d 1154 (7th Cir. 1990). There is no danger of that here. Either the original Lady Baltimore amendment was a nullity, or it exempted Lady Baltimore. If there was a congressional majority for the first position, it is hard to understand why the amendment was enacted at all. No one has suggested and we cannot think up on our own an alternative to the hypothesis that the Lady Baltimore amendment was intended by every member of Congress who voted for it to exempt Lady Baltimore.

But even if this is wrong and there was no effective Lady Baltimore amendment until 1989, neither was there any final judgment in that year. Lady Baltimore paid the district court's judgment in 1988 but there was no finality then because the company was pursuing an appeal that it hoped would result in its getting all its money back. Our order of remand postponed all issues of liability to the arbitration, as the arbitrator at least believed, because he addressed the issue of liquidated damages as well as that of the basic withdrawal liability itself. We did say that the district judge had been right to order Lady Baltimore to make withdrawal payments pending arbitration (and this is relevant to the issue of liquidated damages, taken up next). But we made clear that our ruling was without prejudice to the question whether Lady Baltimore might have the right to get the payments back, whether by reason of the first, albeit defective, Lady Baltimore amendment or because of equitable defenses open to it in the arbitration proceeding that we directed. 868 F.2d at 264-65.

All this would be clearer if instead of commencing a new suit—this suit—Central States had resumed the previous suit after the arbitration, as it could well have done. When we remanded the case for arbitration, 868 F.2d at 265, we didn't tell the district judge to dismiss

the case. We assumed it would be stayed while the parties arbitrated and then resume if as predictable one or both of the parties wanted to challenge the arbitrator's award or to resume their dispute over the constitutional issue that we had held must abide the arbitration. Central States cannot be permitted to gain an advantage by its puzzling decision to drop that suit and start a new one (and pay another filing fee).

It is true that Central States' entitlement to interim payments was independent of the issues in the arbitration, and of the constitutionality of the Lady Baltimore amendment. It rested on the rule that you must pay upon the receipt of the notice of assessment and dispute the assessment (if you want to) afterward. Being unaffected by the order of remand, Central States' entitlement to interim payments might be thought to have vested—to have become constitutional property in the sense in which we spoke in *Reed v. Village of Shorewood*, 704 F.2d 943, 948 (7th Cir. 1983) ("what is securely and durably yours under state (or . . . federal) law, as distinct from what you hold subject to so many conditions as to make your interest meager, transitory, or uncertain")—and thus to have been placed beyond the power of Congress to destroy, at least without compensation, when we affirmed the order to make the interim payments. We needn't decide that. The entitlement in question is like a landlord's right in a security deposit. He can hold the money but he must give it back eventually unless some condition materializes that allows him to keep it. Central States held the interim payments only as (in effect) a bailee until its right to impose withdrawal liability on Lady Baltimore was finally adjudicated. And that came after the second Lady Baltimore amendment.

So there has been no violation of Central States' constitutional rights but, turning now to the cross-appeal, we think Central States is entitled to keep the liquidated damages that the district court awarded it. Those damages

are as we said a penalty for trying to litigate before paying rather than paying upon assessment and litigating to get the payments refunded. While it is possible that when Congress in the Lady Baltimore amendment voided the company's withdrawal liability it meant to void as well all incidental penalties, it did not say that and we are reluctant to read its words so. We note the analogy to criminal contempt: a judgment for contempt is not invalid merely because the order that the contemnor disobeyed turns out to have been invalid. *Maness v. Meyers*, 419 U.S. 449, 458 (1975); *United States v. Lowery*, 733 F.2d 441, 446-47 (7th Cir. 1984). Another analogy is to the district court's power, recently affirmed by the Supreme Court, to impose sanctions under Fed. R. Civ. P. 11 even though the court is later determined to have lacked jurisdiction over the case. *Willy v. Coastal Corp.*, 60 U.S.L.W. 4187 (March 3, 1992). Liquidated damages under the Multiemployer Pension Plan Amendments Act are something that an employer who has withdrawn from an ERISA plan must pay whether or not he has any withdrawal liability. He must pay as a penalty for refusing to follow the statutory procedure for challenging assessments of withdrawal liability. Liability for liquidated damages is separate from the underlying withdrawal liability itself.

The final question is whether Lady Baltimore is entitled to an award of attorneys' fees. 29 U.S.C. § 1132(g)(1). (There can be no doubt that Central States is not entitled to an award of its attorneys' fees.) Three different types of fee are sought: fees incurred in the arbitration proceeding; fees incurred in the district court before the passage of the first Lady Baltimore amendment in 1986; and fees incurred in the district court and this court since. As to the first, the arbtirator could not have awarded fees in the absence of misconduct or bad faith, neither of which is suggested here, by the party sought to be charged. 29 C.F.R. § 2641.9(c); *Rootberg v. Central States, Southeast & Southwest Areas Pension Fund*,

856 F.2d 796, 800 (7th Cir. 1988). As to the second, Central States had a substantial basis (the test in this circuit, see *Pritchard v. Rainfair, Inc.*, 945 F.2d 185, 191 (7th Cir. 1991); *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 830 (7th Cir. 1984)) for believing that Lady Baltimore had withdrawal liability, so Lady Baltimore cannot get those fees back either. As to the fees that it incurred after Congress spoke, its claim is stronger because Central States' constitutional challenge, while not frivolous, may not have had quite the "solidity" of which we spoke in *Bittner* and *Pritchard*. Still, until 1989 Central States had a solid though not to us a sound basis for challenging the applicability, as distinct from the constitutionality, of the Lady Baltimore amendment, and Central States prevailed in the district court in the first round and has prevailed in this court on an important part of its case—the liquidated damages. This is enough to justify the district judge's decision to let each party bear its own legal expenses.

There are some other issues but we need not discuss them. For example, Central States' argument that the Lady Baltimore amendment is a bill of attainder is absurd and requires no (other) comment. The judgment is affirmed insofar as it cancels Lady Baltimore's withdrawal liability and rejects the requests for attorneys' fees, but it is reversed insofar as it orders the repayment of the liquidated damages.

AFFIRMED IN PART AND REVERSED IN PART.

A true Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 90 C 3007

HON. PAUL E. PLUNKETT

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, a pension trust, and MARION M. WINSTEAD, ROBERT C. SANSONE, ROBERT J. BAKER, HOWARD MCDOUGALL, ARTHUR H. BUNTE, JR., R. JERRY COOK, R.V. PULLIAM, SR., and HAROLD D. LEU, the present Trustees,

Plaintiffs,

v.

LADY BALTIMORE FOODS, INC., a Kansas corporation,

Defendant.

MEMORANDUM OPINION AND ORDER

The plaintiff pension trust and its present trustees ("the Fund") ask us to declare the "Lady Baltimore Amendment" to the Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. 99-514, Title XVIII, § 1852 (i) codified at 29 U.S.C. § 1461(h)(1) ("Amendment") unconstitutional and to vacate the arbitrator's restoration of attorney's fees, costs and liquidated damages to Lady Baltimore. The Fund alleges jurisdiction under ERISA § 4301(c), 29 U.S.C. § 1451(c), and 28 U.S.C. § 1331. Lady Baltimore likewise seeks summary judgment on the constitutionality of the Amend-

ment and the enforcement of the arbitrator's decision to restore attorneys' fees, costs, and liquidated damages. Lady Baltimore also seeks fees incurred in this action, the prior district court action, and arbitration pursuant to 29 U.S.C. 1132(g)(1) and 1451(c).

The question of the Amendment's constitutionality is not newly before this court. In *Robbins v. Lady Baltimore Foods, Inc.*, 678 F. Supp. 1323 (N.D. Ill. 1987), the court determined that the Amendment violated both procedural and substantive due process. In *Robbins v. Lady Baltimore Foods, Inc.*, 868 F.2d 258 (7th Cir. 1989), however, the Seventh Circuit vacated the district court's finding of unconstitutionality as unnecessary to the determination of the actual issue before that court, which was whether interim withdrawal liability payments should be made, and as premature inasmuch as the language of the Amendment did not clearly apply to Lady Baltimore.

For the following reasons, we deny the Fund's motion for summary judgment and grant Lady Baltimore's motion for summary judgment on the constitutionality of the Amendment. We vacate the arbitrator's restoration of liquidated damages, attorneys' fees, and costs to Lady Baltimore; however, we order the restoration of liquidated damages plus interest to Lady Baltimore. The parties will bear their own attorneys' fees.

Background [1]

As amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), ERISA requires that an employer withdrawing from a multiemployer pension plan shall pay "withdrawal liability" to the pension fund. 29 U.S.C. §§ 1381-1405. Lady Baltimore had been a contributing employer to the Funds according to a

[1] The parties submitted a joint statement of stipulated facts to the arbitrator and agreed to be bound by them in any subsequent proceeding. Arb. Stip., R. 367.

collective bargaining agreement with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. On January 12, 1979, prior to the enactment of MPPAA, Lady Baltimore entered a new collective bargaining agreement, to remain in effect until May 15, 1982, which included the following provision:

> Section 7. Effective January 12, 1982 all contributions to the Central States Southeast and Southwest Areas Pension Fund shall cease, Sections 1,2,3,4,5, and 6 of this Article shall be null and void and of no further force and effect and all obligations of the Company to said fund or under any trust agreement shall be terminated. From that date forward regular employees shall be eligible to enter into the Company's pension plan pursuant to the terms and provisions of that plan.

In April 1982, Lady Baltimore made its last contribution to the fund. On December 20, 1983, the Fund sent Lady Baltimore a notice and demand for payment of withdrawal liability in the amount of $216,488.80. On November 16, 1984, Lady Baltimore requested arbitration pursuant to 29 U.S.C. § 1401(a).[2]

On November 1, 1985, the Fund filed suit in this court to force Lady Baltimore to make interim payments of the withdrawal liability pending the final decision of the arbitrator.[3] On August 26, 1986, the court ordered Lady

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[2] 29 U.S.C. § 1401(a)(1) provides in part:

> Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration.

Arbitration is viewed as the equivalent of exhaustion of administrative remedies. *Robbins v. Admiral Merchants Motor Freight, Inc.*, 846 F.2d 1054, 1056 (7th Cir. 1988).

[3] Such interim payments must be made pursuant to 29 U.S.C. 1399(c)(2):

[Continued]

Baltimore to begin making withdrawal liability payments as they came due in the future.

On October 22, 1986, the Tax Reform Act of 1986 became law; the Act included the following provision, which had been sponsored by Senator Dole:

> In the case of an employer who entered into a collective bargaining agreement—
>
> (A) which was effective on January 12, 1979, and which remained in effect through May 15, 1982, and
>
> (B) under which contributions to a multi employer plan were to cease on January 12, 1982, any withdrawal liability incurred by the employer pursuant to part 1 of subtitle E of this subchapter as a result of the complete or partial withdrawal of the employer from the multiemployer plan before January 12 [16], 1982, shall be void.

Pub. L. No. 99-514, § 1852(i), 100 Stat. 2869 (October 22, 1986) (codified at 29 U.S.C. § 1461(h)(1)) [later amended by Pub. L. No. 101-239, Title VII, § 7862(a), 7894(5)(a), 103 Stat 2106, 2431 (December 19, 1989)].[4]

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[3] [Continued]

Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b)(1) of this section beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determination of the amount of such liability or of the schedule.

[4] The Amendment as originally enacted in 1986 voided withdrawal liability for withdrawal prior to January *12*, 1982, while Lady Baltimore in fact withdrew on January *16*, 1982. The Seventh Circuit noted this discrepancy, commenting that if the Amendment did not apply to Lady Baltimore, then the district court's opinion on the constitutionality of the Amendment is " 'is pretty close to an advisory opinion in the literal sense.' " *Lady Baltimore*, 869 F.2d at 263, *quoting Peick v. Pension Benefit Guaranty Corp.*, 724

The Fund filed for summary judgment to compel interim payments pending arbitration and on October 27, 1986, Lady Baltimore filed a cross-motion for summary judgment in the district court in part on the basis of this Amendment. This district court granted summary judgment to the Fund, denied Lady Baltimore's motion for summary judgment, and ordered that Lady Baltimore pay past due payments plus interest. *Lady Baltimore*, 678 F. Supp. 1323, having found the Amendment in its original form to be unconstitutional. In a separate order issued on March 17, 1988, the district court granted the Fund $34,065.97 in liquidated damages pursuant to 29 U.S.C. § 1132(g)(2)(C) as well as $8,197.50 in counsel fees and $135.00 in costs under 29 § 1132 (g)(2)(D). R. 829-40. The Seventh Circuit affirmed that portion of the district court decision requiring that interim payments be made, vacated the holding that the Amendment was unconstitutional, and remanded the matter for arbitration. *Lady Baltimore*, 868 F. 2d at 265.

Lady Baltimore later prevailed in arbitration before arbitrator Anthony M. Vernava on the strength of the newly-amended Amendment (the Fund conceded that Lady Baltimore fell squarely under the Amendment's protec-

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F.2d 1247, 1278 (7th Cir. 1983) (Eschbach, J., dissenting), *cert. denied*, 467 U.S. 1259 (1984).

Lady Baltimore admits in its Stipulations in Arbitration that this "defect" in the original amendment was then put to rights when Lady Baltimore requested the change that led to the revised version of the Amendment altering the withdrawal date to January *16*, 1982, allegedly to accommodate Lady Baltimore. Arb. Stip., R. 371, ¶ 34. The 1989 Budget Act amended § 4402(h)(1) providing:

> SEC 7862. AMENDMENTS RELATED TO TITLE XVIII OF THE REFORM ACT
>
> (a) Amendment Related to Section 1852 of the Reform Act. —Paragraph (1) of Section 4402(h) of ERISA is amended by striking "January 12, 1982" the second place it appears and inserting "January 16, 1982."

Pub. L. No. 101-239, 103 Stat. 2106, 2431.

tion). On May 22, 1990, the arbitrator (assuming the constitutionality of the Amendment) found that Lady Baltimore's withdrawal liability was void, ordered the return of $324,965.07 in withdrawal benefits already paid together with interest. The arbitrator also determined that because Lady Baltimore was not obligated to pay withdrawal liability, it was likewise entitled to a refund of the liquidated damages, attorneys' fees, and costs. R. 507.[5]

Now the Fund advances a number of arguments in support of its renewed request that we find the Amendment unconstitutional. In addition, the Fund argues both that the arbitrator did not have the authority to direct the Fund to return the liquidated damages, attorneys' fees, and costs awarded by the district court and that there is in any case no provision in the statute to refund such awards. Lady Baltimore likewise seeks summary judgment.

Discussion[6]

For defendants to prevail on a summary judgment motion, "the pleadings, depositions, answers to interroga-

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[5] The only alleged dispute of material fact is whether the March 17, 1988 award of damages, fees, and costs by the district court was appealed and affirmed by the Seventh Circuit. The arbitrator remarked that both the interim payment issue and the award of liquidated damages, fees, and costs were appealed to the Seventh Circuit, but the Seventh Circuit opinion is silent on the latter award and expressly affirms only the district court's award of interim payments. *Lady Baltimore*, 868 F.2d at 265.

[6] Lady Baltimore protests that the Fund has once again failed to comply with Local Rule 22 and with 28 U.S.C. § 2403(a). Indeed on May 25, 1990, the Fund filed a notice of claim of unconstitutionality under Local Rule 22. As a threshold matter Lady Baltimore argues as it did unsuccessfully in the earlier district court matter that the court must provide notice to the Attorney General "[i]n any action, suit, or proceeding in the court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress

tories, and admissions on file, together with affidavits, if any, [must] show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c). At this stage, we do not weigh evidence or determine the truth of asserted matters. We simply determine whether there is a genuine issue for trial, i.e. "whether a proper jury question was presented." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). If the nonmoving party bears "the burden of proof at trial on a dispositive issue, [however] . . . the nonmoving party [is required] to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986), quoting Fed. R. Civ. P. 56 (e). As we find no disputes of material fact, we move to the legal arguments.

I. *The Constitutionality of the Lady Baltimore Amendment*

While the Seventh Circuit vacated the district court's ruling that the Amendment was unconstitutional because the district court had reached the issue unnecessarily, the Amendment has now been applied squarely to Lady Baltimore's withdrawal liability obligation, and the Fund does not dispute that, under the narrow provisions of the Amendment, Lady Baltimore is relieved of its withdrawal liability obligation. The Fund now renews its attack on the Amendment, arguing that it violates substantive due process, equal protection, procedural due process, the

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affecting the public interest is drawn in question." 28 U.S.C. § 2403(a). The district court discounted this provision, determining that this matter, the effect of which was so very narrow, hardly affects "the public interest." *Cox v. Schweiker*, 684 F.2d 310, 319 (5th Cir. 1982). *Lady Baltimore*, 678 F. Supp. at 1329 n.2. Because of the narrow scope of this legislation, we would agree that the provision of 28 U.S.C. § 2403 need not come into play.

Takings Clause, and the requirement of separation of powers. Finally, the Fund seeks to invalidate the Amendment as constituting a forbidden Bill of Attainder.

A. *Substantive Due Process*

The Funds argue that it is impermissible for Congress to take property from one private entity and give it to another private entity, when no *public* good is served. *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 79 (1937). The leading case to guide us in these matters is *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976), which counsels that

> [i]t is now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in any arbitrary and irrational way . . . our cases are clear that legislation readjust-rights and burdens is not unlawful solely because it upsets otherwise settled expectations.

Id. See Peick, 724 F.2d at 1265 (using the *Turner-Elkhorn* standard rather than a Contract Clause analysis suggested by a *Nachman v. Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), *aff'd*, 446 U.S. 354 (1980) to examine the constitutionality of MPPAA). The court, however, must exercise special care when assessing retroactive legislation to determine whether its retroactivity is "rationally and non-arbitrarily related to legislative goals." *Peick*, 724 F.2d at 1266, *citing Turner-Elkhorn*, 428 U.S. at 16. Further, it is for Congress, rather than the courts, to decide whether legislation is appropriate. *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963). It is not for the judiciary to concern itself with the "wisdom, need, or appropriateness of the legislation." *Olsen v. Nebraska ex rel. Western Reference & Bond Ass'n*, 313 U.S. 236, 246 (1941).

The district court relied on the above authority and the apparent absence of legislative history regarding the impetus behind the Amendment in concluding that Congress was motivated by no discernible public purpose in enacting § 1461(h)(1) and that the Amendment was therefore arbitrary and irrational. *Lady Baltimore*, 678 F. Supp. at 1328. In addition, Judge Decker said that the fact that the Amendment operates retroactively "makes it all the more pernicious." *Id.* at 1329. The court was not persuaded by the assertion that Congress is permitted to tinker with any provision that it has created, arguing that the view that Congress may freely redistribute private property for the sole benefit of one private party is "Orwellian." *Id.*

The Fund stresses once again that the legislation was aimed very specifically at lifting the burden from Lady Baltimore at the expense of the Fund and that the Legislature enunciated no public purpose. Indeed, the Fund notes Senator Metzenbaum's complaint that the Amendment constitutes "a special relief act [that grants Lady Baltimore relief] by passage of retroactive legislation surreptitiously attached to a budget bill." 135 Cong. Rec. S. 16660 (daily ed., Nov. 21, 1989). The House Conference Report addressing the amended date is equally clear: "The change in the effective date of the MPPAA of 1980 with respect to a certain employer is modified to change the effective date from January 12, 1982, to January 16, 1982. . . ." H.R. Conf. Rep. No. 841, 99th Cong. 2d Sess. 1, *reprinted in* 1986 U.S. Code Cong. & Admin. News. 4075, 4939. But the question before us is whether this narrowly focussed legislation is therefore so clearly arbitrary and irrational as to "preclude the assumption that it rests upon some rational basis." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

Lady Baltimore argues that the fact that legislation adversely affects or benefits only one entity does not destroy the presumption of rationality. *City of New*

Orleans v. Dukes, 427 U.S. 297 (1976). In *Dukes*, the Court found that the fact alone that the ordinance challenged affected the interests of only a few New Orleans pushcart vendors did not make it irrational. Rather, the overriding test was whether the legislature operated on a rational basis. In both *Dukes* and *Maine Central R. Co. v. B.M.W.E.*, 813 F.2d 484 (1st Cir.), *cert. denied*, 484 U.S. 825 (1987), a legitimate state interest was found that went beyond the immediate interests of the few parties affected. Lady Baltimore asserts that the Fund has succeeded in arguing only that Congress has passed an act that affects specific individuals, but has not borne its burden of demonstrating that § 1461(h)(1) is for that reason alone arbitrary or irrational.

We will not deny that the lack of legislative history with regard to the Amendment at issue has given us pause. Senator Metzenbaum's comments and the excerpts from Lady Baltimore's pleadings below[7] do, to some extent, create an odor of impropriety. We find, however, that we cannot properly consider this Amendment in a vacuum given Congress's history of post-enactment adjustments to MPPAA.

Since its enactment in 1980, MPPAA has been the subject of judicial and congressional examination on sev-

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[7] For example:

> Lady Baltimore asked Congress to clarify that the ERISA withdrawal liability provisions were not meant to apply to it. An amendment by Senator Dole to the Senate version of the Tax Reform Act covered the specific Lady Baltimore situation. (Defendant's Response to Plaintiff's Motion to Compel Interim Payments at 4-5. (R. 769-70)).
>
> [Lady Baltimore] has sought assistance from Congress in resolving its dispute with the Fund. Senator Dole of Kansas submitted an amendment to the Tax Reform Act of 1986 on Lady Baltimore's behalf to clarify congressional intentions concerning the imposition of multiemployer withdrawal liability and to eliminate the dispute over withdrawal liability for this employer. (Lady Baltimore's Suggestions in Opposition to the Fund's Motion for Summary Judgment at 9. (R. 784)).

eral occasions. When originally enacted, MPPAA became law on September 26, 1980, but its effective date was set five months earlier on April 29, 1980. The onerousness of this retroactivity provision was subject to continued attack until the Supreme Court settled the question by approving the retroactive effect in *Pension Benefit Guaranty*, 467 U.S. at 730-31 (the retroactivity of MPPA is justified because "[o]ne of the primary problems Congress identified under ERISA was that the statute encouraged employer withdrawals from multiemployer plans. And Congress was properly concerned that employers would have an even greater incentive to withdraw if they knew that legislation to impose more burdensome liability on withdrawing employers was being considered.").

Hard on the heels of this ruling, Congress itself had second thoughts about MPPAA's retroactivity, and on July 18, 1984, Congress amended the effective date of MPPAA to eliminate its retroactive application. Pub. L. No. 98-369, § 588(a)(1), 98 Stat. 494, 899 (1984), codified at 29 U.S.C. § 1381 [§ 588]. This change in MPPAA of course engendered a new round of litigation addressing whether § 588 was unconstitutional because it deprived funds of property without due process. Examining the legislative purpose behind the change, the court in *Long Islands Oil Products, Inc. v. Local 553 Pension Fund*, 775 F.2d 24, 28-29 (2d Cir. 1985), found that Congress's own explanation of its rationale sufficed: MPPAA retroactivity was unduly burdensome on employers that withdrew between April and September 1980, and the retroactivity provision had served its original purpose, which was to discourage employers from withdrawing in anticipation of MPPAA. In upholding the constitutionality of § 588, the *Long Island* court said:

> Congress singled out a group of employers it believed were treated unfairly under the provisions of a previous Act. That determination seems reasonable. Congress acted to correct this perceived inequity . . . .

> Such legislation may not be stricken simply because it arguably shifts some burdens to multiemployer plans, other employers, and the PBGC; nor should a court consider itself a 'super-legislature' and re-evaluate the balance that Congress has struck. (Citations eliminated).

Long Island, 775 F.2d at 29.[8]

We also note that Congress made a very similar and narrow accommodation for an individual or group in Pub. L. 98-369, § 588(d), 98 Stat. 899 (July 18, 1984) [29 U.S.C. § 1381, note]:

> (d) Special rule for certain binding agreements.—In the case of an employer who, on September 26, 1980, has a binding agreement to withdraw from a multiemployer plan, subsection (a)(1) shall be applied by substituting 'December 31, 1980' for 'September 26, 1980.'

This provision, like the subsequent Amendment that we examine, address admittedly narrow situations, but ones that Congress could rationally have decided required correction in light of Congress's decision to change the retroactive application of MPPAA. While we are not entirely comfortable ascribing motivation to Congress, the impetus

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[8] The *Long Island* court also addressed the argument that the legislative history was not detailed enough to support a finding of constitutionality. The court said that

> [t]he Constitution does not require that Congress provide a detailed justification for its actions. And, while the existence of detailed legislative history occasionally provides valuable assistance to courts interpreting legislation, there is no power to require it. In *R.A. Gray & Co.*, for example, the Court observed "We have doubts . . . that retroactive application of the MPPAA would be invalid under the Due Process Clause for lack of notice even if it was suddenly enacted by Congress without any period of deliberate consideration, as often occurs with floor amendments or 'riders' added at the last minute to pending legislation." 104 S. Ct. at 2719.

Long Island, 775 F.2d at 31.

behind the Amendment and the above provision seems to us to be clear. We are less inclined to assume, as Lady Baltimore has suggested, that Congress was motivated by the Fund's alleged initial refusal to accept contributions from Lady Baltimore and the fact that Lady Baltimore had already paid in more than its fair share to the Fund.

In sum, even in the absence of clear legislative history to support the enactment of the Amendment, we are not prepared to *presume* that this narrowly tailored provision is irrational and arbitrary. Indeed, we are obliged to do just the opposite. *Turner-Elkhorn*, 428 U.S. at 15-16. Nor are we in a position to pass judgment on whether this was a wise move on Congress's part. *See Olsen*, 313 U.S. at 246. As the Court in *Long Island Oil* noted,

> Congress has vast discretion when adjusting and distributing the economic benefits and burdens relating to employers' plans and a government agency. It is not our task to decide who should receive what benefit, and at whose expense.

Long Island, 775 F.2d at 29.

By the same token, we cannot say that the Amendment was not a rational part of Congress's larger scheme to adjust MPPAA to promote fairness among all parties affected by it.

B. *Equal Protection*

The Fund next argues that the Amendment violated the Equal Protection Clause of the Fifth Amendment because it singles out a class of one as a favored constituent. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (Equal Protection Clause of the Fifth Amendment applies to congressional action). On the other hand, economic legislation "that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally

related to a legitimate governmental purpose." *Hodel v. Indiana*, 452 U.S. 314, 331 (1981). The *Hodel* Court went on to say that a provision will fail under this analysis if its "treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that (a court) can only conclude that the legislature's actions were irrational." *Id.* As in due process analysis, "such legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness or irrationality." *Id.* at 331-32. Again, we cannot say that Congress's move to adjust the provisions of MPPAA is so irrational and arbitrary as to fall outside of that body's legitimate purpose in shifting economic burdens.

C. *Procedural Due Process*

We give short shrift to the Fund's half-hearted attempt to argue that Congress was obliged to provide due process but failed to do so and that the Amendment is unconstitutional for this reason. Indeed, the Fund does not renew the argument that the district court relied on in finding a procedural due process violation. *Lady Baltimore*, 678 F. Supp. at 1329. The parties have stipulated in any event that the Fund was aware of the proposed Amendment and lobbied against it. Arb. Stip. ¶ 37, R. 371.

D. *Takings Clause*

The Fund argues that at the time of the enactment of the Amendment it had a property interest in the withdrawal liability allegedly owned by Lady Baltimore. The Fund asserts that this property interest was taken without just compensation and without a public purpose. Whether the Fund had a property interest in the withdrawal liability at the time of the enactment is a thorny matter we need not reach because we find the reasoning in *Connolly v. Pension Benefit Guarantee Corp.*, 475 U.S.

211, 222-23 (1986), to be instructive. In that case the Court rejected the argument that MPPAA withdrawal liability is a prohibited taking, stating that

> [i]n the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others. . . . Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another.

The Court went on to quote *Turner-Elkhorn*, which stated that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations . . . . This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." *Turner-Elkhorn*, 428 U.S. at 15-16, *quoted in Connolly*, 475 U.S. at 223. We find this approach to be dispositive of the takings argument, finding as we have that Congress's decision to enact the Amendment was rational.

E. *Separation of Powers*

The Funds argue that the Constitution reserves to the judiciary the exercise of judicial powers and such reservation is offended in this instance by Congress's move to relieve Lady Baltimore of withdrawal liability after the entry of the district court award of liquidated damages, attorneys' fees, and costs. The Fund argues that the sole purpose of the Amendment was to benefit Lady Baltimore by depriving the Fund of a final judgment. The Fund argues that the "pragmatic, flexible approach" to separation of powers questions advocated in *Nixon v. Administrator of General Serv.*, 433 U.S. 425, 442 (1977), is not possible here because, unlike the *Nixon* situation, no broad policy function for the legislation is being put forth. We disagree.

It is certainly true that Congress may not interfere with a final judgment (*Fleming v. Rhodes*, 331 U.S. 100 (1947)), but we do not consider the district court determination that delinquent interim payments must be made as a final judgment, dependent as it is on the ultimate outcome of arbitration on the merits. Attendant on the district court's determination that Lady Baltimore was delinquent in its obligations *at that time*, was the mandatory assessment of the statutory penalties found in 29 § 1132 (g)(2). But the arbitrator is empowered by the statute to refund any overpayments with interest, determine whether there have been underpayments, or as the arbitrator did here, determine that there is no withdrawal liability.

The Fund maintains that the award of attorneys' fees, costs, and liquidated damages was in fact appealed to the Seventh Circuit, but we note once again that the opinion gives no indication that the court considered these matters. *Lady Baltimore*, 868 F.2d 258. In its reply brief, the Fund objects to Congress's intervention in active litigation, but we would note that as a practical matter Congress would be foreclosed from making any changes at all in such controversial statutes as MPPAA if it were obliged to wait until all litigation had ceased. In any case, as our discussion below will indicate, we find that the assessment of liquidated damages is so intimately tied to a determination of withdrawal liability that such an assessment may not stand in a situation such as this one where withdrawal liability is determined to be void.

F. *Bill of Attainder*

Article I, Sec. 9, Cl. 3 of the Constitution provides that Congress may enact no bill of attainder; a bill of attainder is a statute that applies "either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." *U.S. v. Lovett*, 328 U.S. 303, 315

(1946). The Fund maintains that here the intended party to be benefitted by the Amendment is certainly readily ascertainable and that the Fund was as a consequence singled out for "punishment" without benefit of judicial trial. The Fund quotes from 2 L. Rotunda, J. Nowak, & J. Young, *Treatise on Constitutional Law Substance and Procedure*, 121-22 (1986) for the proposition that

> [W]henever the Court is confronted with the claim that legislation constitutes a bill of attainder, it must determine whether the designation of persons based on past conduct simply names individuals for punishment or whether the designation promotes a *nonpunitive* goal based on reasonable criteria over which the individual has some control.

However,

> [t]hat burdens are placed on citizens by federal authority does not make those burdens punishment. . . . [there is no bill of attainder merely because an] individual or defined group is tainted whenever he or it is compelled to bear burdens which the individual or group dislikes. . . . This view would cripple the very purpose of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality.

Nixon, 433 U.S. at 470.

Lady Baltimore maintains, and we agree, that there was no punishment herein the sense proscribed by the Constitution, but that Congress was merely righting an inequity and shifting economic burdens. Consequently, we find that the Amendment does not constitute a forbidden bill of attainder.

II. *Arbitrator Erred in Returning Liquidated Damages and Attorneys' Fees because MPPAA does not Allow such a Refund and the Arbitrator May not Overturn a District Court Decision*

The arbitrator, applying the amended form of the Amendment in Lady Baltimore's favor, found that "any withdrawal liability incurred by the employer . . . as a result of the complete or partial withdrawal of the employer from the multiemployer plan before January 16, 1982, shall be void." 29 U.S.C. § 1461(h)(1). The arbitrator accordingly restored all interim payments with interest, which he was empowered to do under 29 U.S.C. § 1401(d). The arbitrator also ordered the refund of the district court's award of liquidated damages, costs, and attorneys' fees. The Fund now argues that the arbitrator could refund the interim payments and interest only but not the other fees for two reasons:

1. MPPAA does not provide for a refund of these mandatory awards; and

2. MPPAA does not authorize an arbitrator to overturn or modify a court decision making such awards.

Both of these contentions are true enough. The arbitrator did exceed his authority when he decided to restore the liquidated damages, costs, and attorneys' fees that had been awarded by the district court judge. Clearly, an arbitrator may determine the withdrawal liability and adjust for any overpayment or underpayment. 29 U.S.C. §§ 1401(a) and (d); 29 C.F.R. § 2641.7 (1985) An arbitrator may also award attorneys' fees 29 U.S.C. § 1401(a)(2). However, the arbitrator is given no express authority to overturn a district court's award made under 29 U.S.C. § 1132(g)(2). Consequently, we vacate the portion of the arbitrator's decision that restores those monies to Lady Baltimore following the arbitrator's quite proper finding that the Amendment rendered Lady Baltimore free of any withdrawal liability.

The statute is also silent regarding the refund of attorneys' fees, costs, and liquidated damages awarded by the court in a civil enforcement action under circumstances such as these where arbitration ultimately determines that no withdrawal liability is owing after all. It is beyond cavil that § 1132 (g) (2) is a *mandatory* (*See United Retail and Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128, 134 (3d Cir. 1986)) provision:

> (2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court *shall* award the plan—
>
> (A) the unpaid contributions,
>
> (B) interest on the unpaid contributions,
>
> (C) an amount equal to the greater of—
>
> (i) interest on the unpaid contributions, or
>
> (i) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),
>
> (D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and
>
> (E) such other legal or equitable relief as the court deems appropriate.

(emphasis supplied).

This mandatory provision is rather strong medicine to be sure, but the effect of it is to encourage plans to respect the MPPAA's "pay now, dispute later" provisions. *See Robbins v. Lady Baltimore Foods*, 678 F. Supp. at

1325. Lady Baltimore's obligation to begin interim payments and keep them up to date was not interrupted by the request for arbitration. 29 U.S.C. § 1399(c)(2). Failure to make these required "interim" payments resulted in the filing of a civil suit in federal district court, and Lady Baltimore was ordered to pay up on the state of the facts and the law at that time.

The Fund can hardly be accused of overreaching when it took Lady Baltimore to court at that point, and we cannot say that Judge Decker erred in enforcing the requirement that interim payments be made. Nor can we say that the assessment of § 1132(g)(2) penalties was inappropriate. In any case, the ultimate return of the interim payments plus interest, which we certainly affirm, made Lady Baltimore whole with respect to any of the voided withdrawal liability that it had already handed over. Lady Baltimore also argues that it is entitled to a refund of attorneys' fees and costs. We disagree because Lady Baltimore brought those charges on itself by failing to honor the "pay now, dispute later" provisions embodied in 29 U.S.C. §§ 1399(c)(2) and 1401(d). *Robbins v. Pepsi-Cola Metro. Bottling Co.*, 800 F.2d 641, 642 (7th Cir. 1986)(per curiam).

We do find merit, however, in Lady Baltimore's contention that it should be refunded the liquidated damages of $34,065.97 that were awarded prior to the determination that Lady Baltimore's withdrawal liability was void. To be sure, the statute is silent regarding the return of such an award, so we turn to the legislature's intention in enacting the provision. In short, mandatory liquidated damages awards "compensate the plans for delay and give employers an incentive to be forthcoming with payments." *Central States, S.E. & S.W. Areas Pension Fund v. Gerber Truck Serv.*, 870 F.2d 1148, 1156 (7th Cir. 1989). *See Central States, S.E. and S.W. Areas Pension Fund v Alco Express Co.*, 522 F. Supp. 919, 926-28 (ED.

Mich. 1981) (quoting extensively from the legislative history).

Liquidated damages are based on an estimated anticipated injury and may not be so excessive that they constitute a penalty. Here the computation of liquidated damages was no doubt reasonable at the time, but in light of the function of the Amendment, the sum turns out to have been keyed to a phantom anticipated injury. By the terms of the Amendment the liability is rendered void; therefore, we find that the sum of $34,065.97 must be returned with interest to Lady Baltimore. Any other outcome would constitute an unjustifiable windfall for the Fund and would not in any way serve Congress's purposes in enacting MPPAA.

Finally, we deny Lady Baltimore's request that we award attorneys' fees in its favor on this and the prior district court action. In addition, both parties shall pay their own attorneys' fees arising out of the arbitration.

Conclusion

For the foregoing reasons, we deny the Fund's motion for summary judgment regarding the constitutionality of the Lady Baltimore Amendment. We grant Lady Baltimore's motion on the Amendment. We vacate the arbitrator's decision to restore the liquidated damages, attorneys' fees, and costs imposed on Lady Baltimore by the district court, but we order that the return of the interim payments with interest be made. In addition, we restore to Lady Baltimore liquidated damages in the amount of $34,065.97 plus interest. Finally, both parties will bear their own attorneys' fees arising out of both district court proceedings and the arbitration.

ENTER:

/s/ Paul E. Plunkett
PAUL E. PLUNKETT
United States District Judge

DATED: June 13, 1991

APPENDIX C

AMERICAN ARBITRATION ASSOCIATION

Case No. 51-621-0011-85V

In the Matter of Arbitration
Under the Multiemployer Pension Plan
Amendments Act of 1980,
As Amended
Between

LADY BALTIMORE FOODS, INC.

- and -

CENTRAL STATES SOUTHEAST and
SOUTHWEST AREAS PENSION FUND

STATEMENT OF FACTS

Introduction

This arbitration involves a dispute between Lady Baltimore Foods, Inc., (herinafter referred to as "Lady Baltimore", the "Company", or the "Employer") and Central States Southeast and Southwest Areas Pension Fund (hereinafter referred to as "Central States," or the "Fund," or the "Pension Fund").

The facts were presented by Stipulation, signed by both parties, and by Joint Exhibits. An arbitration hearing was held, followed by Briefs and Reply Briefs. (See hereinafter.)

The issue is whether Lady Baltimore owes the Fund withdrawal liability under the withdrawal liability pro-

visions of the Employer Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multi-employer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1101-1461, and by amendments, intended to apply to Lady Baltimore, in the Tax Reform Act of 1986 (Pub. L. No. 99-514, § 1852(i), 100 Stat. 2085, 2869) (the "1986 Tax Reforms Act," "TRA", or the "1986 Act") and the Omnibus Report Reconciliation Act of 1989 (Pub. L. No. 101-239, 103 Stat. 2106) (the "1989 Budget Act" or the "1989 Act") the latter being passed and signed into law subsequent to the arbitration hearing, but briefed by the parties.

An arbitration hearing was held on September 18, 1989, in Chicago, Illinois. At the hearing, argument was heard from counsel, and the parties agreed to submit the case for decision based upon Stipulations, Exhibits, Affidavits and Post-Hearing Briefs and Reply Briefs.

Subsequent to the hearing, namely, on November 21, 1989, Congress passed, and the President thereafter signed into law, on December 19, 1989, the 1989 Budget Act. The 1989 Act amends section 4402(h)(1) of ERISA, 29 U.S.C. § 1461(b)(1), to void the liability of an employer that withdrew from a multiemployer pension plan "before January 16, 1982."

The Fund concedes that, as a result of the 1989 amendment, Lady Baltimore satisfies section 4402(h)(1), as so amended by the 1989 Act. However, the Fund argues that the 1989 amendment as well as the amendment made by the 1986 Act (reviewed hereinafter) is unconstitutional. The Fund has announced its intention to appeal to the United States courts in order to obtain review and a final adjudication of the constitutionality of the 1989 amendment, and, by implication, the 1986 amendment, which is in tandem with the 1989 amendment, except for the January 16, 1982 date, said date being "January 12, 1982," under the 1986 Act. These amendments are known as the "Lady Baltimore" amendments.

The parties submitted their Briefs on or about December 4, 1989, and their Reply Briefs on or about January 22, 1990, which were thereafter transmitted by the American Arbitration Association to the Arbitrator.

Inasmuch as the application of section 4402(h)(1), as amended by the 1989 Act, is not in dispute, and by agreement of the parties and this Arbitrator, the issue of its constitutionality properly belongs before the Federal courts and not in this arbitration proceeding, wherein the statute has been taken to be presumptively constitutional, an Interim Decision is hereby rendered in the proceeding. This procedure will allow the parties to proceed to the United States court in order to resolve the constitutional issue, while preserving jurisdiction in this arbitration proceeding with respect to issues that would become relevant only if the statute is held, upon a final adjudication, to be unconstitutional.

If, contrariwise, the statute should be held in Federal court to be constitutional, certain disputed issues, namely, Lady Baltimore's so-called "equitable defenses", (see hereinafter), become irrelevant; and, certain ancillary issues, namely, Lady Baltimore's liability for liquidated damages, attorneys' fees and court costs become moot. Liquidated damages, expenses and costs were awarded by the District Court in the following amounts: liquidated damages, $34,065.97; attorneys' fees, $8,197.50; and, court costs, $135.00. *Robbins v. Lady Baltimore Foods, Inc.*, 678 F. Supp. 1323 (N.D. Ill. 1987), *rev'd on other grounds*, 868 F.2d (7th Cir. 1989).

The statute concerning these damages and expenses provides:

> (2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—
>
> * * * *

(C) an amount equal to the greater of—
(i) interest on the unpaid contributions, or (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under paragraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant. . . .
29 U.S.C. § 1132(g)(2)(C)(D)

If, section 4402(h)(1) is held to be unconstitutional, upon a final adjudication in Federal court, the withdrawal liability issue would remain to be decided on another basis, namely, the equitable defenses, or any one thereof, which then become relevant. Accordingly, the Arbitrator retains jurisdiction to decide these disputed, but non-dispositive equitable issues, which need not be decided here now, should the statute be held to be unconstitutional, and any other disputed issues that may be remanded for hearing thereon in this proceeding.

Adoption of this procedure, as noted, allows the Fund to proceed to Federal court, its already-announced intention despite the outcome of this proceeding, and results in a decision, the basis of which is fully reviewed hereinafter, by the Arbitrator to order the Fund to repay to Lady Baltimore the amount of its withdrawal liability payments, including principal and interest, together with repayment of the liquidated damages, expenses and costs reviewed hereinabove, and, will expedite the final resolution of this case.

The relevant facts are detailed as follows.

Detailed Statement of Facts

1. Lady Baltimore is a Kansas corporation that operates a wholesale grocery business in Kansas, Missouri and

Oklahoma. (Joint Stipulation ¶ 1; hereinafter referred to as "J.S. ¶ —.")

2. The Fund is a defined benefit pension plan established pursuant to agreements between the International Brotherhood of Teamsters ("IBT") and various employer groups (J.S. ¶ 2.) The Fund is a multiemployer pension plan as defined in section 4001(a)(3) of ERISA, 29 U.S.C. § 1301(a)(3).

3. Beginning in 1969, Lady Baltimore was a signatory to a series of collective bargaining agreements with Local Union 955 of the Department Store, Package Grocery, Paper, House, Liquor and Meat Drivers, Helpers and Warehousemen ("Local 955"), an affiliate of the IBT, which represented certain of Lady Baltimore's employees for purposes of collective bargaining.

4. The foregoing agreements required Lady Baltimore to contribute to the Fund on behalf of employees represented by Local 955.

5. Additionally, Lady Baltimore was also a signatory to a "Participation Agreement" with Local 955 requiring such contributions to the Fund. (J.S. Ex. 2a.) Lady Baltimore is an employer for purposes of the withdrawal liability provision of ERISA. (J.S. Ex. 2a).

6. The 1975-1978 Collective Bargaining Agreement expired in October 1978, and contract negotiations took place for the balance of 1978 and into January of 1979. (J.S. ¶ 4 and 5.)

7. In 1979, a new Collective Bargaining Agreement was executed. (J.S. ¶ 6 and 7). This Agreement repeated the pension obligations of Lady Baltimore set forth in the 1975-1978 Collective Bargaining Agreement (J.S. Ex. 3, the "1979 Collective Bargaining Agreement") with two changes. First, the contribution amounts set forth in Section 1 were changed (J.S. Exhs. 2 and 3, Article XVIII, Section 1), and the 1979 Collective Bargaining Agreement added a new section 7 to Article XVIII.

8. The new language in Section 7 of the pension article of the 1979 Agreement was as follows:

> "Effective January 12, 1982 all contributions to the Central States Southeast and Southwest Areas Pension Fund shall cease, Sections 1, 2, 3, 4, 5 and 6 of this Article shall be null and void and of no further force and effect and all obligations of the Company to said Fund or under any trust agreement shall be terminated. From that date forward regular employees shall be eligible to enter into the Company's pension plan pursuant to the terms and provisions of that plan." (J.S. Ex. 3, Article XVIII, section 7.)

9. Under the 1979 Collective Bargaining Agreement, Lady Baltimore's pension contribution commitment expired before the 1982 expiration date of the remainder of the Agreement. (J.S. Ex. 5.)

10. Under the terms of the Agreement, Lady Baltimore was obligated to pay contributions to the Fund based upon the weeks (or any portion of a week) worked by it employees. (J.S. Ex. 3 at 14.)

11. Contributions for work performed by Lady Baltimore employees during the last week of December, 1981 and the first week of January, 1982 were forwarded by Lady Baltimore to the Fund in February of 1982. On April 13, 1982, the Fund wrote to Lady Baltimore requesting contributions for the second week in January of 1982, which began on Sunday, January 10, 1982 (J.S. Ex. 10.) because the 1979 Agreement required contributions through January 11, 1982. (J.S. Ex. 10.)

12. Because Lady Baltimore's employees had worked on January 10 or January 11 (when Article XVIII Sections 1 through 6 of the Collective Bargaining Agreement were still in effect), Lady Baltimore on April 22, 1982 submitted a check for $962.00 to the Fund representing the weekly contribution for employees who had worked on January 10 or January 11, 1982. (J.S. ¶ 14.)

13. The back of the check bore the following statement above the endorsement:

> "Accepted by the Central States Area Pension Fund in full satisfaction of any present or future claim or liability of any kind against Lady Baltimore Foods Inc., its officers, agents or assigns".

14. On April 13, 1982, the Fund requested that Lady Balitimore complete a "Statement of Business Affairs," a questionnaire relating to the facts and circumstances surrounding Lady Baltimore's cessation of contributions. (J.S. ¶ 15.)

15. By notice dated December 20, 1983, the Fund notified Lady Baltimore that it had incurred withdrawal liability of $216,488.80. (J.S. ¶ 16.) This amount was subsequently revised by the Fund to $212,797.92 by letter dated March 26, 1984. (J.S. Ex. 17.)

16. In November of 1985, the Fund filed suit in the United States District Court for the Northern District of Illinois to compel Lady Baltimore to make interim withdrawal liability payments of the amount assessed by the Fund, pending outcome of the arbitration. J.S. Ex. 30.)

17. On August 26, 1986, the District Court ordered Lady Baltimore to begin making interim withdrawal liability payments to the Fund on a monthly basis in accordance with the liability payment schedule established by the Fund. (J.S. Exhs. 31 and 32.)

18. On October 22, 1986, the Tax Reform Act of 1986 was passed. The 1986 Act included a statutory provision, now known as the "Lady Baltimore Amendment", which provided as follows:

> In the case of an employer who entered into a collective bargaining agreement—
>
> (A) Which was effective on January 12, 1979, and which remained in effect through May 15, 1982, and

(B) under which contributions to a multiemployer plan were to cease on January 12, 1982,

any withdrawal liability incurred by the employer pursuant to Part I of Subtitle E [of this Subchapter] [29 U.S.C. §§ 1381-1405] as a result of the complete or partial withdrawal of the employer from the multiemployer plan before January 12, 1982, shall be void.

ERISA section 4402(h)(1), codified at 29 U.S.C. §§ 1461 (b)(1) as added by Pub. L. No. 99-514, § 1852(i), 100 Stat. 2085, 2869).

19. Following passage of the 1986 Act, Lady Baltimore contended in the District Court that the amendment voided its withdrawal liability. The Company also asserted several "equitable" challenges to the assessment, and requested the Court to enter a judgment quashing the liability assessment.

20. The Fund responded that the 1986 amendment was inapplicable, because Lady Baltimore had withdrawn on or after January 12, 1982, and not before that date, as required by the amendment. In the alternative, the Fund asserted that if the Lady Baltimore amendment was applicable then it violated the Due Process and Takings clauses of the Fifth Amendment to the United States Constitution, and should be held unconstitutional.

21. On October 14, 1987, the District Court granted the Fund summary judgment against Lady Baltimore. *Robbins v. Lady Baltimore Foods, Inc.*, 678 F. Supp. 1323. The court held that the "Lady Baltimore" amendment was unconstitutional, and was therefore "null and void." Accordingly, the court ordered Lady Baltimore to make its past due withdrawal liability payments. 678 F. Supp. at 1330.

22. Thereafter, on March 17, 1988, the District Court issued a separate order granting the Fund $34,065.97 in liquidated damages pursuant to ERISA section 502(g)

(2)(C), 29 U.S.C. § 1132(g)(2)(C), as well as $8,197.50 in counsel fees under ERISA section 502(g)(2)(D), 29 U.S.C. § 1132(g)(2)(D), and costs of $135.00. In reaching this conclusion, the court noted that section 502(g) provides that, when a pension plan prevails in an action to collect delinquent withdrawal liability payments, the court shall award the plan liquidated damages and reasonable attorneys' fees.

23. Lady Baltimore appealed both the October, 1987 and March, 1988 orders to the United States Court of Appeals for the Seventh Circuit. On February 14, 1989, that court issued an opinion that affirmed the District Court's decision with respect to interim payments, liquidated damages, attorneys' fees and costs. 868 F.2d 258. However, the Seventh Circuit vacated that portion of the District Court's opinion dealing with the constitutionality of the Lady Baltimore amendment. The Seventh Circuit directed that the case be remanded to arbitration to determine: (1) whether there was any merit to Lady Baltimore's equitable defenses to the Fund's assessment; and (2) whether Lady Baltimore in fact had withdrawn from the Fund "before January 12, 1982." The Seventh Circuit noted that resolution of either of these issue might make it unnecessary for a court to consider the constitutionality of the Lady Baltimore amendment.

24. On November 21, 1989, the Senate and House of Representatives passed H.R. 3299, the 1989 Budget Act. Among other things, the 1989 Act amends section 4402(h)(1) of ERISA, the special legislation embodying the original "Lady Baltimore Amendment." In particular, section 7862(a) of the 1989 Act provides as follows:

> (a) AMENDMENT RELATED TO SECTION 1852 OF THE REFORM ACT.—Paragraph (1) of section 4402(h) of ERISA is amended by striking "January 12, 1982" the second place it appears and inserting "January 16, 1982".

The 1989 Act relieves Lady Baltimore from liability because, as the Fund concedes, the company withdrew from the Fund before January 16, 1982.

25. According to the Fund, the 1989 Amendment does not resolve this dispute, however, because the Fund's position is that: (1) both the 1986 and 1989 amendments are unconstitutional, and (2) secondarily, Lady Baltimore's so-called "equitable defenses" do not defeat the Fund's assessment of withdrawal liability.

26. The Fund's position, based solely on the statute, is that:

> . . . "the terms of the statute *mandate* that the arbitrator enter an award voiding the Fund's assessment."

(Fund's Brief, p. 38); (Emphasis added); and that:

> "The Arbitrator should issue an award that . . .
>
> * * * *
>
> (3) confirms that section 4402(h)(1) of ERISA, as amended, applies to Lady Baltimore; and
>
> (4) confirms that Lady Baltimore is exempt from withdrawal liability, if at all, solely by virtue of the Lady Baltimore Amendment".

(Fund's Reply Brief (pp. 15-16.)

27. The Fund has announced its intention to contest the constitutionality of Section 4402(h)(1) of ERISA (29 U.S.C. § 1461(b)(1)) in Federal Court.

28. Both the Fund and the Company have advised the Arbitrator at the Hearing and by Brief that despite this arbitration:

> ". . . resolution of this case will ultimately turn on whether the Lady Baltimore Amendments are constitutional." (Tr. at 39, 48-49, 50-51.)

29. The parties further agreed that the Arbitrator need not rule on the constitutional issues because said issues fall within the jurisdiction of the courts. *Id.*

30. The following issues are therefore undisputed:

A.) the Lady Baltimore Amendment, as revised by the 1989 Act, applies to the instant case;

B.) the Lady Baltimore Amendment, if constitutional, exempts Lady Baltimore from any withdrawal liability to the Fund; and

C.) review of the constitutionality of the Lady Baltimore Amendment is exclusively within the jurisdiction of the Federal courts, and is not before this arbitration proceeding.

31. As a result of the 1989 amendment, and, consequently, the statutory exemption of Lady Baltimore from withdrawal liability, if the statute is constitutional, Lady Baltimore's equitable defenses are made unnecessary to this decision.

31. The issues in dispute are:

A.) whether Lady Baltimore withdrew "before", "on", or "after" January 12, 1982, the Fund conceding that Lady Baltimore withdrew before January 16, 1982;

B.) whether Lady Baltimore's "equitable defenses", or any one thereof, excuse it from withdrawal liability;

C.) whether Lady Baltimore is entitled to a refund from the Fund of payments of $34,065.97 in liquidated damages, $8,197.50 in attorneys' fees, and $135.00 in costs as awarded by the United States District Court, in view of the 1989 amendment; and

D.) whether Lady Baltimore may be awarded its own attorneys' fees (a matter that it has raised by Brief in this arbitration proceeding, but with respect to which it has not introduced any figures).

FINDINGS, INTERIM DECISION AND AWARD

Introduction

1. The Findings in this proceeding are based upon the Joint Stipulation, Joint Exhibits, and the positions of the parties in their respective Briefs and Reply Briefs, as the same relate to: all undisputed issues, and certain disputed issues.

2. This Interim Decision and Award is premised upon the constitutionality of the 1989 amendment, and, by necessary inference, the constitutionality of the 1986 amendment, namely, section 4402(h)(1), which are taken as presumptively constitutional in this arbitration proceeding.

3. Jurisdiction is retained by the Arbitrator in order to rule upon any issues, the decision with respect to which is not necessary to this Interim Decision and Award, as a result of the presumptive constitutionality of the 1989 amendment and the concession of the Fund with respect to Lady Baltimore's date of withdrawal, i.e., before January 16, 1982, (see Detailed Statement of Facts, Paragraphs 24, 26 and 30B, hereinabove), in the event that the Federal court declares the statute to be unconstitutional and remands for further findings.

Detailed Findings

1. The 1989 Budget Act amends section 4402(h)(1) of ERISA, 29 U.S.C. § 1461(b)(1), the so-called "Lady Baltimore Amendment", providing:

> SEC. 7862. AMENDMENTS RELATED TO TITLE XVIII OF THE REFORM ACT.
>
> (a) Amendment Related to Section 1852 of the Reform Act.—Paragraph (1) of section 4402(h) of ERISA is amended by striking "January 12,

1982" the second place it appears and inserting "January 16, 1982".

Pub. L. No. 101-239, 103 Stat. 2106, 2431.

2. The foregoing amendment, the purpose of which was to revise the January 12, 1982 date appearing in section 4402(h)(1) of the 1986 Tax Reform Act, eliminates withdrawal liability for unfunded vested benefits of an employer which withdrew from a multiemployer plan before January 16, 1982. Section 4402(h)(1) of the 1986 Tax Reform Act had provided:

> (i) AMENDMENT RELATED TO SECTION 4402 OF ERISA—Section 4402 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1461) is amended by adding at the end thereof the following new subsection:
>
> (h)(1) In the case of an employer who entered into a collective bargaining agreement—
>
> (A) which was effective January 12, 1979 and which remained in effect through May 15, 1982 and
>
> (B) under which contributions to a multiemployer plan were to cease on January 12, 1982,
>
> any withdrawal liability incurred by the employer pursuant to Part I of Subtitle E as a result of the complete or partial withdrawal of the employer from the multiemployer plan before January 12, 1982 shall be void. (S. 33.)

3. The foregoing 1986 and 1989 amendments were passed in order to void Lady Baltimore's withdrawal liability under the Collective Bargaining Agreement in effect on the instant case.

4. Despite the 1986 amendment, there was an issue, prior to the 1989 amendment, as to whether section

4402(h)(1) of the 1986 Act effectively voided Lady Baltimore's withdrawal liability despite the clear intention of the statute to do so.

5. The foregoing ambiguity was due to the factual issue of whether Lady Baltimore had withdrawn from the multiemployer plan "before January 12, 1982."

6. The 1989 Budget Act removed this ambiguity by changing the January 12, 1982 date to January 16, 1982.

7. The Fund, which had argued at the arbitration hearing in Federal court preceding the hearing and by Brief that Lady Baltimore did not withdraw "before January 12, 1982", concedes that Lady Baltimore withdrew from the multiemployer plan "before January 16, 1982."

8. Therefore, both the Employer and the Fund agree that section 4402(h)(1) of ERISA, as amended by the 1989 Act, applies to Lady Baltimore. This becomes dispositive of this case with respect to withdrawal liability unless the statute is held upon a final adjudication by a United States court to be unconstitutional. (See Paragraph 12 hereinafter.)

9. However, the Fund's position is that Lady Baltimore is exempt from withdrawal liability, if at all, solely by virtue of the Lady Baltimore amendment, as revised by the 1989 Act. The Employer's position is that: it was exempt from withdrawal liability by the 1986 Act on the grounds that it in fact withdrew prior to January 12, 1982; that any ambiguity with respect to the application of the 1986 Act has been clarified by the 1989 Act and that Lady Baltimore certainly has been exempted from withdrawal liability under the Collective Bargaining Agreement by the 1989 Act, on the grounds that it withdrew prior to January 16, 1982.

10. The Fund, as noted hereinabove, concedes that Lady Baltimore is exempt from withdrawal liability by the 1989 Act on the grounds that Lady Baltimore withdrew

prior to January 16, 1982 as provided for under the 1989 Act.

11. Lady Baltimore's further position is that it is exempt from withdrawal liability on equitable grounds based on certain "equitable defenses". These are, as set forth in Lady Baltimore's Brief, that: (1) the Fund had first objected to and then acquiesced in the collective bargaining language, which provided that all obligations of the Company to the Central States Fund were terminated effecitve January 12, 1982, and was thereby estopped from denying the validity of the language, (2) the Fund had cashed Lady Baltimore's restrictively endorsed check expressly foreclosing any further liability, (3) Lady Baltimore had already paid to the Fund more than enough money to cover any obligation the Fund might have to provide benefits to Lady Baltimore employees, and (4) the Fund had delayed unduly in asserting its claims, and withdrawal liability should be denied on the basis of laches.

12. Both parties agree that the Arbitrator need not rule on the constitutional issues presented by section 4402 (h) (1), i.e., the constitutionality of a retroactive application of section 4402 (h) (1) to eliminate employer withdrawal liability for unfunded vested benefits accrued prior to the date of withdrawal, because review of the constitutional issue falls within the jurisdiction of the Federal courts, to which the Fund has stated its intention to appeal for a determination of this constitutional issue.

13. On remand to arbitration, the United States Court of Appeals for the Seventh Circuit, which heard this case after the 1986 Act but before the 1989 Act, directed the Arbitrator to make a finding with respect to the Employer's date of withdrawal. That direction was premised on the January 12, 1982 date under the 1986 Act because if Lady Baltimore had not withdrawn before

January 12, 1982 the 1986 Amendment could not apply to it, Lady Baltimore would not be exempt from withdrawal liability by the statute, and there would not be a constitutional issue with respect to section 4402(h)(1).

14. Both the Fund and Lady Baltimore agree that Lady Baltimore withdrew before January 16, 1982, the date as revised by the 1989 Act.

15. Lady Baltimore has not abandoned its original position that it withdrew prior to January 12, 1982. If Lady Baltimore did not withdraw before January 12, 1982, it did, however, according to both Lady Baltimore and the Fund, withdraw prior to January 16, 1982, the effective date for voiding withdrawal liability under the 1989 Act.

16. Concerning Lady Baltimore's date of withdrawal from the multiemployer plan, the Arbitrator finds:

A.) that Lady Baltimore did not withdraw before January 12, 1982;

B.) that Lady Baltimore withdrew "effective", or, *on*, January 12, 1982, as provided in the Collective Bargaining Agreement under which Lady Baltimore was obligatd to make contributions to the Fund. Section 7 of Article XVIII established when Lady Baltimore's obligation would cease. It provides in relevant part:

> "Effective January 12, 1982, all contributions to the Central States Southeast and Southwest Areas Pension Fund shall cease . . . and all obligations of the company to said Fund or any trust agreement shall be terminated. . . .";

C.) that there is no factual basis to support Lady Baltimore's position that it withdrew before January 12, 1982 rather than "Effective January 12, 1982", when by the express terms of Section 7 of Article XVIII of the Collective Bargaining Agreement its obligation to the Fund ceased;

D.) that withdrawal of an employer from a multiemployer pension plan occurs when, *inter alia*, the employer "permanently ceases to have an obligation to contribute under the plan", 29 U.S.C. § 1383(a)(1). Section 4203(a) further specifies that "the date of a complete withdrawal is the date of the cessation of the obligation to contribute. . . ." 29 U.S.C. § 1383(e); and, in the instant case, this is January 12, 1982.

17. Concerning the issue of withdrawal liability, the Arbitrator finds, as a result of finding that Lady Baltimore withdrew on January 12, 1982:

A.) that the 1989 amendment to section 4402(h)(1) applies to provide that:

> ". . . any withdrawal liability incurred by the employer pursuant to Part I of subtitle E as a result of the complete or partial withdrawal of the employer from the multiemployer plan before January [16] 1982, shall be void";

B.) that inasmuch as Lady Baltimore has made withdrawal liability payments, including interim payments, and interest on the foregoing payments pending the outcome of this arbitration, it is found that, consistent with section 4402(h)(1), Lady Baltimore is entitled to repayment of the foregoing amounts, which, subject to clarification by the parties, are as follows:

—Principal and interest	(8/86-10/88)	$120,016.08
—Principal	(6/9/89) —	$150,029.46
—Interest	(6/9/89) —	54,520.00
—Interest	(6/29/89)—	341.80
—Interest	(8/7/89) —	57.73
	TOTAL	$324,965.07

together with interest from the date of Lady Baltimore's payments to the Fund to the date of the Fund's repayment;

C.) that inasmuch as Lady Baltimore is not liable for withdrawal liability payments, Lady Baltimore is entitled to repayment by the Fund for: liquidated damages in the amount of $34,065.97; attorneys' fees in the amount of $8,197.50; and, costs in the amount of $135.000, all as awarded by the Federal District Court in *Robbins v. Lady Baltimore Foods, Inc.*, 678 F. Supp. 1323 (N.D. Ill. 1987), *rev'd on other grounds*, 868 F. 2d 258 (7th Cir. 1989).

18. No findings are made in this Interim Decision concerning whether Lady Baltimore is entitled to an award of its own attorneys' fees, an issue raised by Lady Baltimore in its Brief, but with respect to which it introduced no figures. The Arbitrator retains jurisdiction to review, if remanded for further consideration, these disputed and ancillary issues (Paragraphs 17 C and 18) pending a decision by the United States court with respect to the constitutionality of section 4402(h)(1).

19. The Arbitrator makes no findings in this Interim Decision concerning Lady Baltimore's "equitable defenses" to withdrawal liability (enumerated in Paragraph 11 hereinabove) for the reason that: if section 4402(h)(1), as amended, is constitutional, the need for this arbitration proceeding to pass upon Lady Baltimore's "equitable defenses" has been eliminated inasmuch as Lady Baltimore's assessed withdrawal liability has been voided by the statute.

20. If, alternatively, the statute is held in Federal court to be unconstitutional, thereby failing, on such statutory basis, to void Lady Baltimore's withdrawal liability, the issue of Lady Baltimore's equitable defenses would become relevant. Whether such equitable defenses might discharge Lady Baltimore, either in whole or in part, from withdrawal liability need be considered only then in this arbitration.

21. The Arbitrator therefore retains jurisdiction in order to decide the merits of Lady Baltimore's equitable defenses should the Federal court, upon a final adjudication of the statutory issue, hold section 4402(h)(1), as amended, to be unconstitutional.

INTERIM DECISION AND AWARD

Conclusion

Having considered the Joint Stipulation, Joint Exhibits, Briefs and Reply Briefs, as well as the transcript of the hearing in this arbitration proceeding, with respect to the issues in the instant case, the Arbitrator makes the following Interim Decision and Award:

1. The Employer completely withdrew from the multiemployer plan on January 12, 1982.

2. The Employer's withdrawal liability is voided by the 1989 Act, which amends section 4402(h)(1), to void withdrawal liability for an employer with respect to unfunded vested benefits where such employer withdrew prior to January 16, 1982.

3. Based upon the statutory amendment exculpating withdrawal liability, said amendment being treated as presumptively constitutional for the purpose of this arbitration proceeding, it is ordered that the Fund repay to Lady Baltimore three hundred and twenty-four thousand, nine hundred and sixty-five dollars and 07/100 ($324,965.07), together with interest from the date of Lady Baltimore's payments to the Fund to the date of the Fund's repayment; and repayment of liquidated damages in the amount of thirty four thousand sixty-five dollars and 97/100 ($34,065.97), attorneys' fees in the amount of eight thousand one hundred ninety seven dollars and 50/100 ($8,197.50) and costs in the amount of one hundred and thirty-five dollars ($135.00).

4. Because the statutory amendment voids Lady Baltimore's withdrawal liability, this arbitration award does

not rule upon Lady Baltimore's "equitable defenses," which would become relevant only upon a final adjudication in Federal court that the statutory amendment is unconstitutional.

5. This arbitration proceeding does not rule upon the issue of, and possible award to Lady Baltimore of its own attorneys' fees, a matter raised by Brief by Lady Baltimore, but without the presentation of the amount thereof.

6. Jurisdiction is retained by the Arbitrator for the purpose of: full review of (1) Lady Baltimore's equitable defenses if the statutory amendment is held to be unconstitutional, and (2) the issue of liquidated damages, expenses and costs, listed in Paragraph 3 hereinabove, together with the issue of a possible award of attorneys' fees and costs listed in Paragraph 5, if these latter issues are remanded to be decided in this arbitration proceeding, dependent upon the holding by the United States court with respect to the constitutional issue.

7. The Arbitrator's fee and the fees of the American Arbitration Association shall be shared—the Employer paying one-half and the Fund one-half. Each party shall bear the cost of its own legal expense in this proceeding.

Date: May 22, 1990

/s/ Anthony M. Vernava
ANTHONY M. VERNAVA
Impartial Arbitrator

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 85 C 9262

LORAN W. RORRINS, *et al.*,
Plaintiffs,

vs

LADY BALTIMORE FOODS, INC.,
Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiffs, trustees of the Central States, Southeast and Southwest Areas Pension Fund ("the Fund"), commenced this action pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* As amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), ERISA provides in part that upon withdrawal from a multiemployer pension plan, an employer shall owe the plan a certain "withdrawal liability." 29 U.S.C. §§ 1381-1405. The Fund brought the instant suit against defendant employer Lady Baltimore Foods, Inc. ("Lady Baltimore") to compel interim withdrawal liability payments, pursuant to 29 U.S.C. §§ 1399 (c)(2) and 1401(d), pending final determination of Lady Baltimore's total withdrawal liability. Jurisdiction is founded upon 29 U.S.C. §§ 1132(e), 1132(f), and 1451 (c). The Fund now moves for summary judgment. Lady Baltimore makes a cross motion for summary judgment on the grounds that it is expressly exempted from withdrawal liability by statute.

I. *Statutory Framework*

Before exploring the facts of the instant case, we must survey but one small chamber of ERISA's architecture. As noted, when an employer leaves a multiemployer plan, the employer owes the plan a withdrawal liability. 29 U.S.C. § 1381. This withdrawal liability serves to cover the employees' share of the vested, but unfunded, benefits. *Robbins v. B and B Lines, Inc.*, No. 86-1863 slip op. at 2 (7th Cir. Sept. 9, 1987). Although the pension plan makes the initial assessment of withdrawal liability, 29 U.S.C. § 1382,

> Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration.

29 U.S.C. § 1401(a). The arbitrator's award is subject to judicial review. 29 U.S.C. § 1401(b)(2).

Despite such ample opportunity to contest assessed withdrawal liability, Congress clearly envisioned a " 'pay now, dispute later, collection procedure." *Robbins v. Pepsi-Cola Metropolitan Bottling Co.*, 800 F.2d 641, 642 (7th Cir. 1986) (per curiam). 29 U.S.C. § 1399(c)(2) provides:

> Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b)(1) of this section beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.

29 U.S.C. § 1401(d) also elaborates the mandatory nature of "interim" payments:

> Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration,

> with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 1145 of this title).

The withdrawal liability provisions of the MPPAA have been upheld as constitutional. *Connally v. Pension Benefit Guaranty Corp.*, —— U.S. ——, 106 S. Ct. 1018 (1986); *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984); *Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d 1247 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984).

II. *Factual Background and Procedural Posture*

Lady Baltimore, a Kansas corporation, entered into a collective bargaining agreement that became effective on January 12, 1979, and which remained in effect through May 15, 1982. Under Article XVIII, Section 7,

> Effective January 12, 1982 all contributions to the Central States, Southeast and Southwest Areas Pension Fund shall cease, Sections 1, 2, 3, 4, 5 and 6 of this Article shall be null and void and of no further force and effect and all obligations of the Company to said Fund or under any trust agreement shall be terminated.

Agreement, Lady Baltimore's Suggestions in Support of its Motion for Summary Judgment and in Opposition to the Fund's Motion for Summary Judgment, Exhibit 1.[1]

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[1] The Fund maintains that Lady Baltimore did not actually withdraw until January 16 because January 12, 1982 fell on a Tuesday, and Article XVIII, Section 2 of the Agreement provided in part that the company was to make contributions for the entire

On or about December 27, 1983, the Fund sent Lady Baltimore a notice and demand for payment of withdrawal liability in the amout of $216,488.80. This document notified Lady Baltimore that it was required to discharge its liabilities in monthly payments of $4,967.25, the first such payment to be made on February 1, 1984. Subsequently, the Pension Fund voluntarily reduced the assessment of Lady Baltimore to $212,797.92, and changed the monthly rate of demanded payment to $5,001.06. The Fund and Lady Baltimore are presently engaged in § 1401(a) mandatory arbitration over the assessed withdrawal liability.

On November 1, 1985, the Fund filed the instant suit to force Lady Baltimore to make interim payments of its assessed withdrawal liability pending the outcome of arbitration. On August 26, 1986, the Court ordered Lady Baltimore to begin making its assessed monthly payments as they became due. Therefore, the Fund's motion for summary judgment effectively prays for such interim payments to continue, and to collect unpaid, pre-August, 1986 interim payments. The Fund also seeks interest on these past due payments plus attorney's fees, costs, and an additional amount equal to the greater of (1) the interest on the unpaid contributions, or (2) liquidated damages not in excess of 20% of the unpaid contributions. *See* 29 U.S.C. § 1132(g)(2). Lady Baltimore, in its cross motion for summary judgment, seeks relief from the Court's August 26, 1986 order for it to make interim payments, and Lady Baltimore also requests that payments it has made pursuant to the order be returned to it with interest.

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week (i.e., through Saturday) in which a given employee worked. Thus, contends the Fund, a genuine issue of material fact exists as to precisely when Lady Baltimore withdrew. However, under Section 7 of the same Article, the provisions of Section 2 were null and void effective January 12, 1982. Therefore, no genuine issue of material fact exists as to when Lady Baltimore withdrew: by January 12, 1982.

III. *Discussion*

Summary judgment is appropriate if the parties' submissions demonstrate that there is no *genuine* issue of *material* fact and the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, —— U.S. ——, 106 S. Ct. 2505, 2510 (1986). The moving party will be entitled to judgment as a matter of law if the non-moving party fails to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof. *Celotex v. Catrett*, —— U.S. ——, 106 S. Ct. 2548, 2553 (1986).

To support its motion for summary judgment the Fund relies on the above-quoted language of 29 U.S.C. §§ 1399(c)(2) and 1401(d). The Fund argues simply that Lady Baltimore's undisputed withdrawal automatically triggered its duty to make interim payments, pending the outcome of arbitration. Lady Baltimore counters with a number of equitable defenses to the Fund's motion, as well as a specific statutory defense which also forms the basis of its own motion. The Court will consider first Lady Baltimore's equitable defenses.

A. *Equitable Defenses*

To avoid interim payments, Lady Baltimore raises a number of equitable defenses to withdrawal liability in general. First, Lady Baltimore maintains that the collective bargaining agreement expressly precludes any withdrawal liability in its provision that "all obligations of the Company to said fund" would terminate effective January 12, 1982. Furthermore, Lady Baltimore argues that, since the Fund first objected to and then acquiesced in this language, it is estopped from denying the validity of the liability limitation. Third, Lady Baltimore suggests that the Fund is also estopped from asserting withdrawal liability because it cashed a check, as Lady Baltimore's last pre-withdrawal payment in 1982, restrictively endorsed to preclude any further liability of Lady Baltimore. Fourth, Lady Baltimore maintains that it has

already paid to the Fund more than enough money to cover the vested benefits of its employees. Finally, Lady Baltimore argues that the Fund has delayed unduly in asserting its claims, and interim payments should be denied on the basis of laches.

The Fund steadfastly maintains that all of these arguments are immaterial to its demand of *interim* payments, and go only to the issue of withdrawal liability *per se*, which is currently being arbitrated. Indeed, 29 U.S.C. §§ 1399(c)(2) and 1401(d) expressly provide for interim payments pending arbitration, and § 1401(a) makes it clear that all disputes over the assessed withdrawal liability must be arbitrated. Lady Baltimore counters that, as its equitable defenses to withdrawal liability present no factual ambiguities, arbitration is unnecessary, and the Court can deny the Fund interim payments as a matter of law.

In making such an assertion Lady Baltimore misconstrues the statutory requirements of the MPPAA. Establishing that a withdrawal liability dispute raises only questions of law will not suffice to remove a case from mandatory arbitration. *I.A.M. National Pension Fund v. Clinton Engines Corp.*, No. 86-5387, slip op. at 16 (D.C. Cir. July 28, 1987). Congress was concerned that if employers could use litigation to delay making withdrawal liability payments, the fiscal health of entire pension funds could be severely jeopardized. *Robbins v. Chipman Trucking, Inc.*, No. 85 C 1489 slip op. at 13-14 (N.D. Ill. Dec. 8, 1986) But this is not to say a court has no discretion in ordering interim payments. *See Robbins v. McNicholas Transportation Co.*, 819 F.2d 682 (7th Cir. 1987). In *McNicholas Transportation*, the pension fund found a withdrawal—probably erroneously—where the employer stopped making contributions after being shut down by a strike. The district court had ordered payment of interim withdrawal liability, pending arbitration, reading the statute as giving it no discretion to refuse to issue such an order. The employer contended that since its assessed *monthly* liability was $71,000, and

its current *annual* income (non-operating) was less than $100,000, the district court's order would make its resumption of operations economically impossible. The Court of Appeals vacated and remanded, concluding that

> . . . where the trustees bring an action to compel payment, pending arbitration, the court should consider the probability of the employer's success in defeating liability before the arbitrator and the impact of the demanded interim payments on the employer and his business.

Id. at 685.

But although the Seventh Circuit allows an examination of a case's merits, as well as employer hardship, a substantial allegation of employer hardship remains a threshold prerequisite to the court's exercise of discretion. In *McNicholas Transportation* itself, the district court's order of interim payments was effectively moot because it would have instantly bankrupted the employer. In ordering the district court to exercise discretion on remand, the court deferred to the reasoning of the Pension Benefit Guaranty Corporation, which is statutorily charged to enforce Title IV of ERISA. 29 U.S.C. § 1303 (e)(1). The Seventh Circuit quoted a passage from the corporation's brief in another case, part of which read:

> "Ordinarily, in the absence of a demonstration that making interim payments would inflict irreparable injury on an employer, a court should enforce the interim payments requirement without examining the merits of the underlying dispute concerning withdrawal liability."

819 F.2d at 686. Delaying interim payments, pending arbitration, whenever an employer asserts meritorious defenses to withdrawal liability would directly frustrate Congressional intent that pension funds be secure first, and that such meritorious defenses be arbitrated later. *Id.* at 685.

In the case at bar, Lady Baltimore asserts no particular economic hardship from making interim payments. The Seventh Circuit leaves no doubt that "compelled payment of money, recoverable with interest upon later determination of error, is not, in itself, irreparable harm." *Id.* Therefore, since Lady Baltimore cannot allege irreparable harm from making interim payments, the court may not reach its equitable defenses to interim withdrawal liability.

B. *Statutory Defense*

The big gun in Lady Baltimore's arsenal of arguments against interim withdrawal liability, which it fires at the expense of all other arguments in its own motion for summary judgment, is that it has been statutorily exempted—in an amendment to the MPPAA drafted specifically for it—from paying any withdrawal liability to the Fund. Passed as part of the massive Tax Reform Act of 1986, Pub. L. No. 99-514, § 1852(i), 100 Stat. 2869 (1986), 29 U.S.C. § 1461(h)(1) states as follows:

> In the case of an employer who entered into a collective bargaining agreement—
>
> > (A) which was effective on January 12, 1979, and which remained in effect through May 15, 1982, and
> >
> > (B) under which contributions to a multiemployer plan were to cease on January 12, 1982,
>
> any withdrawal liability incurred by the employer pursuant to part 1 of subtitle E of this subchapter as a result of the complete or partial withdrawal of the employer from the multiemployer plan before January 12, 1982, shall be void.

The Fund argues that this statutory provision is unconstitutional, but first argues that the court cannot con-

strue the statute's effect on interim liability, it being just another asserted defense for arbitration.

1. *Reaching § 1461(h)(1)*

The Fund seeks to delay consideration of this statute's effect, characterizing it as simply one more issue for the arbitration table. But the Fund's contention that the court must allow the arbitrator to first construe § 1461(h)(1) ignores the precise wording of the provision. § 1461(h)(1) would void "any withdrawal liability incurred by the employer pursuant to part 1 of subtitle E . . . ." Part 1 of subtitle E includes 29 U.S.C. § 1401(a), which provides for arbitration of withdrawal liability disputes. § 1461(h)(1) would thus void any finding of liability by the arbitrator *per se*. Therefore, the question of § 1461(h)(1)'s validity is a legal threshold to arbitration. The court is presently concerned only with *interim* withdrawal liability. But if § 1461(h)(1) would nullify all withdrawal liability, even that found ultimately by an arbitrator, it would block interim liability as well. Therefore, the court must decide the provision's validity. *Compare Shelter Framing Corp. v. Pension Benefit Guaranty Corp.*, 705 F.2d 1502, 1508-1509 (9th Cir. 1983), *rev'd on other grounds sub nom. Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984) (in dispute over withdrawal liability, district court did not have to leave for arbitration question of MPPAA's constitutionality).

2. *Constitutionality of § 1461(h)(1)*

On the merits, the Fund's principal argument with respect to § 1461(h)(1) is that it violates substantive due process on its face. The Fifth Amendment provides in part that "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. V. It is axiomatic that "one person's property may not be taken for the benefit of another private per-

son without a justifying public purpose. . . ." *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80 (1937). Due process forbids a law that is wholly arbitrary and irrational. *See, e.g., Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 650 (1974). Furthermore,

> In cases where the legislation in question has retroactive effect, special care must be taken in applying the "arbitrary and irrational" test to determine if there was indeed justification for the added burden which retroactive legislation imposes on those it regulates.

Peick v. Pension Benefit Guaranty Corp., 724 F.2d 1247, 1266 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984).

The legislative history of the Tax Reform Act of 1986 provides no clue to the justification for 29 U.S.C. § 1461(h)(1). *See, e.g.*, H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. 1, *reprinted in* 1986 Code Cong. & Admin. News 4075. However, Lady Baltimore's various briefs suggest why no such justification is forthcoming. Facing the instant lawsuit, Lady Baltimore petitioned its Congressional representatives to relieve it retroactively from its specific liability to the Fund. As a result, Kansas Senator Robert Dole offered what is now ERISA § 4402 (h)(1), 29 U.S.C. § 1461(h)(1), as an Amendment to the Tax Reform Act of 1986. The provision tracks precisely terms of Lady Baltimore's collective bargaining agreement "to eliminate Lady Baltimore's withdrawal liability to the Fund." Lady Baltimore's Motion for Immediate Relief from the Court's Order of August 26, 1986 and for Summary Judgment at 2. Indeed, Lady Baltimore is quite candid that "[t]he *sole purpose* of this provision. . . was to eliminate Lady Baltimore's withdrawal liability to the Fund." Lady Baltimore's Suggestions in Support of its Motion for Summary Judgment and in Opposition to the Fund's Motion for Summary Judgment at 2 (emphasis added).

With no purpose for altering the liability of one private entity to another—other than to do just that—29 U.S.C. § 1461(h)(1) is wholly arbitrary and irrational. This would be true even if it had no retroactive effect; thus, the fact that § 1461(h)(1) works retroactively makes it all the more pernicious. Lady Baltimore maintains that § 1461(h)(1) was merely intended to "clarify" ERISA's withdrawal liability provisions. Lady Baltimore's Suggestions in Opposition to the Fund's Motion for Summary Judgment at 9. Lady Baltimore argues that since Congress created withdrawal liability, it is empowered to alter such liability as it sees fit. Defendant's Reply Suggestions in Support of its Motion for Summary Judgment at 5. Lady Baltimore's perception of the legislative process is somewhat Orwellian. Although Congress is certainly entitled to tinker with its legislative schemes, and even to do so retroactively at times, as in the enactment of the MPPAA, Congress cannot redistribute property among private parties solely for the benefit of one of those parties. 29 U.S.C. § 1461(h)(1) embodies a blatant violation of substantive due process.

But perhaps even more insidiously, the enactment of § 1461(h)(1) violated *procedural* due process as well. It is difficult to distinguish precisely "legislative" action, which promulgates rules for society, from "judicial" action, which applies these rules to disputes between particular parties. But informing this distinction is the right of affected persons to be heard, which we demand in judicial fora and limit with respect to legislatures. *See e.g., Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915); *Londoner v. Denver*, 210 U.S. 373 (1908). Indeed,

> "the case for due process protection grows stronger as the identity of the persons affected by a government choice becomes clearer; and the case becomes stronger still as the precise nature of the effect on each individual comes more determinately within the

> decisionmaker's purview. For when government acts in a way that singles out identifiable individuals—in a way that is likely to be premised on suppositions about specific persons—it activates the special concern about being personally *talked to* about the decision rather than simply being *dealt with*."

O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 801 (1980) (Blackmun, J., concurring) (quoting L. Tribe, *American Constitutional Law*, § 10-7, pp. 503-504 (1978) (emphasis in original)).

In the case at bar, the dispute between an employer and a pension fund, as to the former's liability to the latter under certain provisions of the MPPAA, *a fortiori* calls for a judicial forum in which both parties may be heard. The employer brazenly admits its efforts to evade such a forum:

> Lady Baltimore has provided the Congress, through Senator Dole, basically the same factual information provided this Court in this case concerning why the withdrawal liability provisions of ERISA would produce unduly harsh results if applied to Lady Baltimore. Congress determined that this is not a factual situation in which it intended withdrawal liability to be assessed and has enacted the transition rule at issue here to eliminate the possibility of such liability.

Defendant's Reply Suggestions in Support of its Motion for Summary Judgment at 6-7. It is for the courts, not Congress, to apply the law to a particular "factual situation." In such an application, the parties to the given "factual situation" have a right to be heard. The Fund was denied this right when Congress "adjudicated" Lady Baltimore's liability to it. Therefore, 29 U.S.C. § 1461 (h) (1) violates procedural due process.

29 U.S.C. § 1461(h)(1) is unconstitutional, and therefore invalid, on the alternate grounds that it violates substantive due process and procedural due process.[2]

3. *Severability of § 1461(h)(1)*

Having found § 1461(h)(1) unconstitutional, it is necessary to determine the extent, if any, to which it taints the rest of ERISA's statutory framework. The Supreme Court has warned that when striking down a provision "a court should refrain from invalidating more of the statute than is necessary." *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984). *Buckley v. Valeo*, 424 U.S. 1, 108-109 (1976) elaborated the test for what is "necessary":

> Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

There can hardly be doubt that Congress originally intended to enact ERISA without § 1461(h)(1), and that ERISA will be "fully operative" without it. § 1461(h)(1) does not represent any legitimate component of a legislative scheme, but rather the litigation tactic of a single, private entity. § 1461(h)(1) can be severed from ERISA without fear.

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[2] Lady Baltimore suggests rather half-heartedly that the court cannot strike down this provision without giving the United States a chance to intervene. Under 28 U.S.C. § 2403(a), the court must certify to the Attorney General any constitutional attack on a statute "affecting the public interest." If this phrase is to have any meaning, it cannot apply to a provision enacted solely to satisfy parochial desires. *Compare Cox v. Schweiker*, 684 F.2d 310, 319 (5th Cir. 1982) (statute is not one "affecting the public interest" if it is no longer on the books and thus can only affect parties to instant case); *Keyes v. Madsen*, 179 F.2d 40, 43 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 928 (1950) (matter of merely local concern does not trigger § 2403(a)). Therefore, § 2403 does not apply to the case at bar.

C. *Details of Judgment*

As Lady Baltimore's equitable defenses to withdrawal liability are a matter for arbitration, and Lady Baltimore's statutory exemption is unconstitutional, the Fund is entitled to summary judgment. Therefore, the monthly interim payments that the court has ordered to be paid since August 1986 must continue pending the outcome of arbitration. In addition, the Fund is entitled to payments due during the period of February, 1984 through July, 1986, and appropriate interest on those payments. *See Robbins v. McNicholas Transportation Co.*, 819 F.2d 682, 686 (7th Cir. 1987).

The Fund has also requested liquidated damages, costs, and attorney's fees pursuant to 29 U.S.C. § 1132(g)(2). Since neither party, in its plethora of briefs, bothered to address this provision, the court will make no determination at this time.

III. *Conclusion*

ERISA § 4402(h)(1), 29 U.S.C. § 1461(h)(1), is hereby declared null and void. The Fund's motion for summary judgment is hereby granted. Accordingly, Lady Baltimore's motion for summary judgment is denied. Interim withdrawal liability payments, ordered by this court in August, 1986 to be paid monthly, shall continue pending the final arbitration of Lady Baltimore's total withdrawal liability. In addition, Lady Baltimore is hereby ordered to pay the Fund its interim withdrawal liability for the period of February, 1984 through July, 1986, plus appropriate interest on that amount. Within ten days the Fund shall submit to this court a statement of the past-due interim withdrawal liability plus interest.

ENTER:

/s/ Bernard M. Decker
United States District Judge

DATED: October 14, 1987.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 87-2753, 88-1280 and 88-1652

LORAN W. ROBBINS, *et al.*,
Plaintiffs-Appellees,
v.

LADY BALTIMORE FOODS, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85-C-09262—Bernard M. Decker, *Judge.*

ARGUED APRIL 21, 1988—DECIDED FEBRUARY 14, 1989

Before WOOD, JR. and KANNE, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

KANNE, *Circuit Judge.* The defendant, Lady Baltimore Foods, Inc. ("Lady Baltimore"), appeals the district court's grant of summary judgment in favor of the plaintiffs, the trustees of the Central States, Southeast and Southwest Areas Pension Fund ("Pension Fund"). Specifically, Lady Baltimore challenges the district court's decision that 29 U.S.C. § 1461(h)(1) was unconstitutional. This statute purported to exempt Lady Baltimore

from withdrawal liability under the Multiemployer Pension Plan Adjustment Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1381-1461.[1] Lady Baltimore also challenges the district court's award of interim withdrawal liability payments to the Pension Fund. For the reasons set out below, we affirm the district court's award of interim withdrawal liability payments, but we reverse the grant of summary judgment against Lady Baltimore as to the constitutionality of 29 U.S.C. § 1461(h)(1), vacate the district court's decision that this statute was unconstitutional, and remand the entire matter for arbitration.

I. Background

A. *Lady Baltimore's Withdrawal from the Pension Fund*

Lady Baltimore Foods, Inc. was a contributing employer to the Pension Fund under the terms of a collective bargaining agreement with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("the Union"). On January 12, 1979, Lady Baltimore and the Union executed a new collective bargaining agreement which remained in effect through May 15, 1982. This agreement included the following pension provision:

> ARTICLE XVIII—PENSION
>
> Section 7. Effective January 12, 1982 all contributions to the Central States Southeast and Southwest Areas Pension Fund shall cease, Sections 1, 2, 3, 4, 5 and 6 of this Article shall be null and void and of no further force and effect and all obligations of the Company to said Fund or under any trust agreement shall be terminated. From that date forward regular employees shall be eligible to enter into the Com-

[1] The MPPAA amended the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1368.

pany's pension plan pursuant to the terms and provisions of that plan.

The Pension Fund initially refused to approve Lady Baltimore's continued participation in the plan on these terms. By letter of December 24, 1980, however, it reversed its position and agreed to permit Lady Baltimore to continue to participate in the Pension Fund. In April of 1982, after a dispute over the amount of the last payment, Lady Baltimore made its final contribution to the fund.[2]

In December, 1983, the Pension Fund advised Lady Baltimore that it determined that Lady Baltimore owed it withdrawal liability under the MPPAA in the amount of $216,488.80. It also notified Lady Baltimore that it was required to discharge this liability in monthly payments of somewhat less than $5,000.00. The Pension Fund subsequently reduced the assessment of Lady Baltimore's withdrawal liability to $212,797.92 and increased the monthly payment to $5,001.06. Lady Baltimore thereafter requested arbitration of its withdrawal liability.[3]

B. *Procedural Posture*

On November 1, 1985, the Pension Fund filed suit in the Northern District of Illinois to compel Lady Baltimore to make interim liability payments pursuant to 29 U.S.C. §§ 1399(c)(2), 1401(d). On December 11, 1985, Lady Baltimore filed its answer denying liability. On June 5, 1986, the Pension Fund filed a motion for summary

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[2] This last payment was made by a restrictively endorsed check. The restrictive endorsement read as follows:

> Accepted by Central States Area Pension Fund in full satisfaction of any present or future claim or liability of any kind against Lady Baltimore Foods, Inc., its officers, agents or assigns.

[3] This arbitration has been pending since on or about November 16, 1984 (Appellant's Brief at 13 n.1). This arbitration has been held in abeyance during the pendency of this litigation.

judgment, requesting continuing and past due interim withdrawal liability payments. On August 26, 1986, the district court entered orders directing Lady Baltimore to pay interim withdrawal liability payments as they became due in the future. It said nothing, however, about past due payments of withdrawal liability.

On October 22, 1986, the Tax Reform Act of 1986 became law. Included in this Act was a statutory provision referred to by appellees as the "Lady Baltimore Amendment." The so-called Lady Baltimore Amendment, Pub. L. No. 99-514, § 1852(i), 100 Stat. 2869 (1986) [codified at 29 U.S.C. § 1461(h)(1)], states as follows:

> In the case of an employer who entered into a collective bargaining agreement—
>
> (A) which was effective on January 12, 1979, and which remained in effect through May 15, 1982, and
>
> (B) under which contributions to a multiemployer plan were to cease on January 12, 1982,
>
> any withdrawal liability incurred by the employer pursuant to Part I of Subtitle E [of this Subchapter] [29 U.S.C. §§ 1381-1405] as a result of the complete or partial withdrawal of the employer from the multiemployer plan before January 12, 1982, shall be void.

The Pension Fund claims that Lady Baltimore notified the district court of the pendency of the Lady Baltimore Amendment before it was enacted into law. The Pension Fund, moreover, cites to numerous instances in the record where Lady Baltimore told the district court that this amendment was passed by Congress, supposedly at the urging of Senator Dole of Kansas, specifically to exempt it (Lady Baltimore) from withdrawal liability under MPPAA.

On or about October 27, 1986, Lady Baltimore filed a cross motion for summary judgment with the district

court. In this motion for summary judgment, Lady Baltimore asked for relief from the district court's order of August 26, 1986, requiring it to make payments of interim withdrawal liability to the Pension Fund. It did so on two grounds. First, it raised a number of equitable defenses to withdrawal liability in general.[4] Second, Lady Baltimore argued that it was not subject to withdrawal liability because 29 U.S.C. § 1461(h)(1) exempted it from such liability. On October 30, 1986, the district court denied Lady Baltimore's motion for immediate relief from interim withdrawal liability payments, but deferred consideration on the impact of § 1461(h)(1) until its ruling on the motion for summary judgment.

On October 14, 1987, the district court granted summary judgment in favor of the Pension Fund and against Lady Baltimore. The district court's order first held that MPPAA required Lady Baltimore's asserted equitable defenses to withdrawal liability to be arbitrated. Thus, they could not be considered by it as a basis for excusing the company from making interim withdrawal liability payments. The district court concluded, however, that it *could* consider the effect of 29 U.S.C. § 1461(h)(1). The court reasoned that this was because this statute, if con-

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[4] First, Lady Baltimore argued that the collective bargaining agreement expressly precluded withdrawal liability by providing that "all obligations of the Company to said fund" would terminate effective January 12, 1982. Second, Lady Baltimore argued that since the Pension Fund first objected to and then acquiesced in this provision, it was estopped from denying the validity of this limitation on its withdrawal liability. Third, Lady Baltmore argued that the Pension Fund also was estopped from asserting that it owed it withdrawal liability because of its cashing of Lady Baltimore's last payment check in April, 1982, which check contained the restrictive endorsement. See note 2, *supra*. Fourth, Lady Baltimore maintained that it already had paid more than enough money to the Pension Fund to cover the vested benefits of its employees. Finally, Lady Baltimore argued that the Pension Fund had delayed too long in asserting its claims, and thus should be denied interim withdrawal liability payments on the basis of laches.

stitutional, would preclude not only withdrawal liability in general, but interim withdrawal liability as well. Earlier in its opinion, the district court determined, over the Pension Fund's objection, that Lady Baltimore had withdrawn from the Pension Fund by January 12, 1982.[5] The district court then found that 29 U.S.C. § 1461 (h)(1) violated the Pension Fund's right to substantive and procedural due process, and therefore was unconstitutional. It also ordered the continuation of interim withdrawal liability payments, and ordered Lady Baltimore to pay past due payments for February, 1984 through July, 1986 plus interest.

Lady Baltimore appeals the district court's denial of its motion for summary judgment, and its grant of the Pension Fund's motion for summary judgment.

II. Discussion

A. *Mechanics of MPPAA*

Because this court has discussed the structure and function of MPPAA elsewhere, only a brief discussion of its mechanics is necessary here. *See, e.g., Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d 1247, 1251-56 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259, 104 S. Ct. 3554, 82 L. Ed. 2d 855 (1984). MPPAA was enacted by Congress to cure the problems arising when an employer ceased making payments to a pension plan fund. When an employer ceased making such payments, the plan

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[5] The Pension Fund maintained in the district court, and still maintains on appeal, that Lady Baltimore did not actually withdraw from it until January 16. This is because January 12, 1982, fell in the middle of the week (Tuesday), and Article 18, § 2 of the collective bargaining agreement provided in part that the company was to make contributions for the entire week in which a given employee worked. Thus, Lady Baltimore's obligation to contribute to the Pension Fund did not cease until January 16 (Saturday of that week). The Pension Fund also maintains that this issue still requires arbitration.

would be left with vested pension obligations which were only partially funded. MPPAA provides that an employer who withdraws from a pension plan covered under it becomes liable for an amount of money designed to cover the employees' share of vested, but unfunded, benefits. 29 U.S.C. §§ 1381(a), 1382; *Robbins v. Admiral Merchants Motor Freight, Inc.*, 846 F.2d 1054, 1055-56 (7th Cir. 1988) *and cases cited therein; Robbins v. B & B Lines*, 830 F.2d 648, 649 (7th Cir. 1987).

Under MPPAA after the sponsor of a multiemployer plan determines that an employer has "withdrawn" within the meaning of 29 U.S.C. §§ 1383, 1385, the sponsor must issue a notice and demand for payment of the employer's withdrawal liability. The notice must include a schedule of payments. 29 U.S.C. § 1399(b)(1). Within 90 days after receiving the notice and demand, the employer may ask the plan's sponsor "to review any specific matter relating to the determination of the employer's liability and the schedule of payments," 29 U.S.C. § 1399(b)(2)(A)(i). After a "reasonable review of any matter raised," the sponsor must notify the employer of its decision. 29 U.S.C. § 1399(b)(2)(B).

If the employer disagrees with the plan's sponsor's decision on review, it must initiate arbitration within 60 days after the earlier of the date it is notified of the decision or 120 days after its request for review. 29 U.S.C. § 1401(a)(1). Courts interpreting § 1401(a)(1) have been consistent and unequivocal in concluding that this provision mandates that any dispute over withdrawal liability must be arbitrated. *Robins v. Admiral Merchants*, 846 F.2d at 1056 (citations omitted). During the pedency of any review or appeal thereof, withdrawal liability payments are due beginning no later than 60 days after the demand. 29 U.S.C. § 1399(c)(2). These payments are referred to as "interim withdrawal liability payments." If these payments are not made, the employer may be subject to a civil action in federal court to compel payment. 29 U.S.C. §§ 1451(b), (c).

This procedure was followed in this case. The only reason that this matter is currently in federal court is because of the Pension Fund's suit to compel Lady Baltimore to make interim withdrawal liability payments.

B. *Reaching the Constitutional Question*

The dispositive issue in this appeal is whether it was proper for the district court (and, in addition, whether it is proper for us) to reach the question of the constitutionality of 29 U.S.C. § 1461(h)(1). This appeal is in an unusual position. Lady Baltimore, which argued that it was proper for the district court to reach the constitutional question at that level, continues to maintain this argument on appeal. The Pension Fund, which argued in the district court that it was improper for the district court to consider the constitutional question until disputed issues of fact had been arbitrated, now argues on appeal that it is proper for this court, in the interest of judicial economy, to reach the constitutional question presented by this case. We agree with neither position. Rather, we agree with the *amicus curiae*, Pension Benefit Guaranty Corporation ("PBGC"), that it was improper for the district court to reach the constitutional question in this case. Not only then do we conclude that it is improper for us to reach this question here, but we vacate the decision of the district court on this question, and remand this matter to where it belongs: the arbitration table.

1. *The General Rule*

It is well established that federal courts must not rule on constitutional issues where other, nonconstitutional dispositive grounds are available. *Jean v. Nelson*, 472 U.S. 846, 854-55, 105 S. Ct. 2992, 2996-97, 86 L. Ed. 2d 664 (1985); *United States v. Security Industrial Bank*, 459 U.S. 70, 78, 103 S. Ct. 407, 412-13, 74 L. Ed. 2d 235 (1982); *Hagans v. Lavine*, 415 U.S. 528, 546-47 & n.12, 94 S. Ct. 1372, 1383-84 & n.12, 39 L. Ed. 2d 577 (1974);

Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-47, 56 S. Ct. 466, 482-83, 80 L. Ed. 2d 688 (1936) (Brandeis, J., concurring). In *Transport Motor Express, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 724 F.2d 575 (7th Cir. 1983), this court reaffirmed this principle in the MPPAA context. We held that the district court should not have reached the question of the constitutionality of MPPAA (before it was amended by the Tax Reform Act of 1986) without first making an explicit determination of a potentially dispositive nonconstitutional issue—the question whether the plaintiff in that case had in fact withdrawn from the fund.

Courts in other circuits, it is true, have addressed "facial challenges" to the constitutionality of withdrawal liability provisions. *See, e.g., Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628, 635 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259, 104 S. Ct. 3553, 82 L. Ed. 2d 855 (1984); *Shelter Framing Corp. v. Pension Benefit Guaranty Corp.*, 705 F.2d 1502, 1509 (9th Cir. 1983), *rev'd on other grounds sub nom. Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984); *Republic Industries, Inc. v. Central Pennsylvania Teamsters Pension Fund*, 693 F.2d 290, 298 (3d Cir. 1982). They only have done so, however, where "[a]rbitration would neither develop a better record for adjudication of the constitutional issues nor eliminate the need to consider the constitutional challenge." *Shelter Framing Corp.*, 705 F.2d at 1509; *see also Republic Industries v. Teamsters Joint Council*, 718 F.2d at 635; *Republic Industries v. Central Pennsylvania Teamsters*, 693 F.2d at 295;[6] *cf. Peick*, 724 F.2d at

---

[6] As this court also noted in *Transport Motor Express*, moreover, other circuits have viewed this issue as an exhaustion of administrative remedies issue. That is, they have seen it as a choice be-

1261-62 (case on MPPAA's constitutionality ripe for adjudication where suit was against PBGC itself and there was no pending or prematurely terminated liability proceeding which would raise substantial nonconstitutional issues required to be resolved before deciding constitutional question). Neither of these preconditions holds true here.

We also disagree with the position of the district court and with various other arguments advanced by the Pension Fund and Lady Baltimore that it was necessary to reach the constitutional question in this case. In its opinion, the district court wrote:

> [Section] 1461(h)(1) would void "any withdrawal liability incurred by the employer pursuant to Part I of Title E . . . ." Part I of Subtitle E includes 29 U.S.C. § 1401(a), which provides for the arbitration of withdrawal liability disputes. § 1461(h)(1) would thus void any finding of liability by the arbitrator *per se*. Therefore, the question of § 1461(h)(1)'s validity is a legal threshold to arbitration. The court is presently concerned only with *interim* withdrawal liability. But if § 1461(h)(1) would nullify all withdrawal liability, even that found ultimately by an arbitrator, it would block interim liability as well. Therefore, the court must decide the provision's validity.

678 F.Supp. at 1328.

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tween sending the case to arbitration and allowing a direct constitutional challenge. In *Transport Motor Express*, this court said:

> We think the problem is more precisely viewed as involving the propriety of reaching constitutional issues when potentially dispositive nonconstitutional questions are presented. The Supreme Court has expressed a strong preference for avoidance of constitutional questions in such situations and we do not see how the forum in which the nonconstitutional issues would be resolved is relevant to that preference.

724 F.2d at 578 n.3 (citations omitted).

First of all, we agree with the *amicus curiae* that although § 1461(h)(1) voids withdrawal liability incurred by applicable employers, it does not purport to invalidate the entire statutory scheme for determining, challenging and resolving the existence and amount of such liability. As we will discuss below, moreover, MPPAA requires *interim* withdrawal liability payments to be made regardless of the nature of an employer's challenge to the underlying withdrawal liability. In other words, interim withdrawal liability payments must be made even if it is ultimately determined, for whatever reason, that the employer has no withdrawal liability.

We also reject the argument of the Pension Fund that, although the district court originally should not have reached this question, we should reach this question for reasons of judicial economy. As the Pension Fund acknowledges, the issue of Lady Baltimore's withdrawal date from the Pension Fund is subject to arbitration. Thus, the applicability of the statute to Lady Baltimore is in dispute. If it is decided, for instance (and we express no opinion as to what the decision should be), that Lady Baltimore's withdrawal date from the Pension Fund was January 16, 1982, the so-called Lady Baltimore Amendment would not apply to it. Thus, the district court would not have had to decide the constitutional issue at all. A decision made in the event that it becomes applicable is "pretty close to an advisory opinion in the literal sense." *Peick*, 724 F.2d at 1278 (Eschbach, J., dissenting) (quoting *People of the State of Illinois ex rel. Barra v. Archer Daniels Midland*, 704 F.2d 935, 941 (7th Cir. 1983)).

Second, there is no "judicial economy" served here by allowing the district court's decision to stand. The district court's decision, as the Pension Fund and *amicus curiae* point out, did not eliminate the need for further arbitration. Lady Baltimore's date of withdrawal from the fund and its equitable defenses still have to be arbitrated. Moreover, these decisions still will be subject to

further judicial review. *Compare Peick*, 724 F.2d at 1262 (where substantial hardship would result if court were to defer an opinion, court's decision was only means of clarifying significant financial uncertainties, and hundreds of cases on similar issues were pending around the country, judicial economy would be enhanced by a ruling from this court).

Finally, Lady Baltimore argues that arbitration will not be necessary because "if § 1461(h)(1) is constitutional, there is nothing to arbitrate." This, however, begs the questions whether first, we can reach the issue of the statute's constitutionality, and second, whether the statute is applicable to it in the first place. The first of these questions, we answer in the negative; the second, we hope, will be resolved by arbitration.

2. *This Case*

In this case, a factual dispute the resolution of which would moot the constitutional issue remains open. This is the issue of Lady Baltimore's withdrawal date from the Pension Fund. As discussed above, the Pension Fund argues that Lady Baltimore could not have withdrawn from the Pension Fund until January 16, 1982. Lady Baltimore on the other hand, argues that it withdrew on or before January 12, 1982. If it is found that Lady Baltimore withdrew from the Pension Fund *after* January 12, 1982, 29 U.S.C. § 1461(h)(1) would not, by its terms, apply to it. Thus, there would be no need to determine this statute's constitutionality. If, moreover, Lady Baltimore was found to have withdrawn from the fund on January 12, 1982, this would raise the question whether the statute, the language of which requires that a covered employer must have withdrawn "before January 12, 1982," applies to it.[7]

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[7] Lady Baltimore argues that, if this statute is not interpreted to apply to it, Congress will have enacted a nullity. We express

We do not believe (and none of the parties, save Lady Baltimore, believes) that this question already has been adjudicated in this case. It is true that the district judge noted in his opinion: "no genuine issue of material fact exists as to when Lady Baltimore withdrew: by January 12, 1982," slip op. at 4 n.1. We do not think that this amounts to an "adjudication" of this issue. For one thing, the district court did not determine whether Lady Baltimore withdrew on January 12 or before January 12. Determination of this fact is necessary to deciding whether Lady Baltimore was covered by § 1461(h)(1).

Even if this dicta did amount to an adjudication of this issue, the question of an employer's withdrawal date from a pension fund is one which is subject to mandatory arbitration under 29 U.S.C. § 1401(a)(1). *Robbins v. Admiral Merchants*, 846 F.2d at 1056-57. Thus, we remand this case with directions that this dispute be, along with Lady Baltimore's equitable defenses, subject to arbitration. Because we determined in *Robbins v. Admiral Merchants* that an employer's withdrawal date is a matter required to be arbitrated under MPPAA, it is not necessary, as it was in *Transport Motor Express*, for the district court to decide whether this matter should be adjudicated or arbitrated, 724 F.2d at 579.

C. *Interim Withdrawal Liability Payments*

As noted above, Lady Baltimore also seeks relief from the district court's order to it to make interim withdrawal laibility payments. We agree with the Pension Fund and the PBGC that this court need not reach the constitutional question in order to decide the issue of whether these payments are owing. We also conclude that Lady Baltimore must make these payments.

It is clear that Congress envisioned a "'pay now, dispute later' collection procedure" for withdrawal liability.

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no opinion on this argument, for we need not address it at this time.

Robbins v. Pepsi-Cola Metropolitan Bottling Co., 800 F.2d 641, 642 (7th Cir. 1986) (per curiam); 29 U.S.C. §§ 1399 (c)(2), 1401(d). In *Robbins v. McNicholas Transportation Co.*, 819 F.2d 682, 685 (7th Cir. 1987), this court opined that "a district court has a measure of discretion whether or not to use injunctive power to compel interim payments in these situations." We conclude that the district court did not abuse its discretion in ordering interim payments of withdrawal liability in this case. In *McNicholas*, we concluded that:

> [W]here the trustees [of a pension fund] bring an action to compel payment, pending arbitration, the court should consider the probability of the employer's success in defeating liability before the arbitrator and the impact of the demanded interim payments on the employer and his business.

819 F.2d at 685.

As the district court recognized, Lady Baltimore asserted no particular economic hardship from making interim payments. In *McNicholas*, we observed that "compelled payment of money, recoverable with interest upon later determination of error, is not, in itself, irreparable harm." *Id.* It is true that the district court did not make an explicit assessment of the merits of Lady Baltimore's case, reasoning that refusal to compel interim withdrawal liability payments in every instance where the employer presents a possibly meritorious defense to liability would frustrate the general intent of Congress that withdrawal liability be paid first and disputed later. We express no opinion on this view, for we think that the purpose of the court's holding in *McNicholas*, to avoid unfair and injurious results not intended by Congress, has been achieved, 819 F.2d at 685-86. Lady Baltimore does not argue on appeal that it will sustain any unintended, irreparable injury by making these payments. Its only contention is that, in accordance with a determination of 29 U.S.C. § 1461(h)(1)'s constitutionality, these payments

should be returned to it. As discussed above, it is not proper to reach this question at this time.

III. Conclusion

We REVERSE the district court's grant of summary judgment against Lady Baltimore on the issue of 29 U.S.C. § 1461(h)(1)'s constitutionality, and VACATE the district court's finding with respect thereto. We further REMAND this matter for arbitration, and AFFIRM the district court's award of interim withdrawal liability payments to the Pension Fund.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Supreme Court, U.S.
FILED
JUL 29 1992
OFFICE OF THE CLERK

No. 92-15

In The

Supreme Court of the United States

October Term, 1992

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,

Petitioners,

v.

LADY BALTIMORE FOODS, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether the district court and the United States Court of Appeals for the Seventh Circuit erred in holding that an amendment to a congressionally-created scheme of economic regulation is not rendered unconstitutional simply because it apparently affects only two entities?

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No. 92-15

In The

Supreme Court of the United States

October Term, 1992

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,

Petitioners,

v.

LADY BALTIMORE FOODS, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counterstatement Of The Case

1. Factual Background.

Lady Baltimore Foods, Inc. ("Lady Baltimore")[1] and Local Union No. 955, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (the "Union") have been parties to successive collective bargaining agreements from at least

[1] Lady Baltimore is a Kansas corporation. It has no parent, subsidiary or affiliated corporations within the meaning of Rule 29.1.

1969 through the present. Upon expiration of the 1975-1978 collective bargaining agreement, Lady Baltimore and the Union negotiated a new agreement which was executed on January 12, 1979, and which remained in effect through May 15, 1982 (the "1979 Agreement"). The 1979 Agreement included the following pension provision:

> Article XVIII - PENSION
>
> Effective January 12, 1982 all contributions to the Central States, Southeast and Southwest Areas Pension Fund shall cease, Sections 1, 2, 3, 4, 5 and 6 of this Article [which outlined the amount of and conditions for contributions to Central States] shall be null and void and of no further force and effect and all obligations of the Company to said Fund or under any trust agreement shall be terminated. From that date forward regular employees shall be eligible to enter into the Company's pension plan pursuant to the terms and provisions of that plan.

Central States was sent a copy of the 1979 Agreement. It objected to the language quoted above, and threatened to terminate Lady Baltimore's participation effective January 12, 1979 unless the Company entered into "an acceptable collective bargaining agreement." Lady Baltimore and the Union did not alter the 1979 Agreement, but Central States later reversed its position and agreed to permit continued participation by Lady Baltimore.

In April of 1982, following a dispute over the amount of the last payment, Lady Baltimore made its final contribution to Central States, which accepted payment by

cashing Lady Baltimore's restrictively-endorsed check. The restrictive endorsement read: "Accepted by Central States Area Pension Fund in full satisfaction of any present or future claim or liability of any kind against Lady Baltimore Foods, Inc., its officers, agents or assigns."

From October 1964 through January 1982, Lady Baltimore contributed Two Hundred Fifty-Six Thousand Nine Hundred Forty-Eight Dollars and Five Cents ($256,948.05) to Central States. Only a handful of Lady Baltimore employees retired with vested benefits under the Central States plan. As of June 1, 1985, the present value of Lady Baltimore's 1964 to 1982 contributions to Central States exceeded the present value of the amount Central States will likely be required to pay to Lady Baltimore employees by $257,780.00.

2. Proceedings Below.

On November 1, 1985 Central States filed suit in the United States District Court for the Northern District of Illinois (*"Lady Baltimore I"*) to compel Lady Baltimore to make interim payments of its assessed withdrawal liability ($212,797.92) pending the outcome of arbitration. On August 26, 1986, the District Court ordered Lady Baltimore to begin making interim withdrawal liability payments in the amount of $5,001.67 per month. The district court did not address the Fund's claim for interim withdrawal liability payments prior to August 26, 1986.

On October 22, 1986, the Tax Reform Act of 1986 became law. The Act included the provision that with one amendment is now codified at 29 U.S.C. § 1461(h)(1) (the "Amendment", see Petition p. 5). Central States had been

aware of and had opposed the adoption of the Amendment in letters to members of Congress. Also, in October of 1986, Lady Baltimore filed a motion for summary judgment based upon the Amendment. Central States argued, *inter alia*, that the Amendment did not apply to Lady Baltimore because it described a withdrawal "before January 12, 1982," whereas Lady Baltimore had withdrawn on January 12, 1982. On October 14, 1987, the district court in *Lady Baltimore I* concluded that the Amendment applied to Lady Baltimore, but was unconstitutional. The court denied Lady Baltimore's motion for summary judgment and granted a summary judgment motion filed by Central States (Appendix, pp. 51a-71a). It later assessed liquidated damages, costs and attorneys' fees against Lady Baltimore.

On appeal, the Seventh Circuit vacated the district court's finding of unconstitutionality and remanded the matter for arbitration (Appendix pp. 72a-86a). Prior to submission of the case to the arbitrator, the 1989 Budget Act was enacted with an amendment to the Amendment to void the liability of an employer who withdrew from a multiemployer pension plan "before January 16, 1982." Central States then conceded to the arbitrator that the Amendment applied to Lady Baltimore. The arbitrator held that the Amendment voided Lady Baltimore's withdrawal liability assessment and ordered the return of all interim payments with interest, as well as the liquidated damages, attorneys' fees and costs previously paid by Lady Baltimore (Appendix, pp. 38a-56a).

On May 25, 1990 Central States filed suit to vacate the arbitrator's award. The district court in *Lady Baltimore*

II reviewed the post-1980 congressional tinkering with the effective date of the Multiemployer Pension Plan Amendment Act ("MPPAA"), and held: " . . . , we cannot say that the Amendment was not a rational part of Congress' larger scheme to adjust MPPAA to promote fairness among all parties affected by it." (Appendix, pp. 28a-29a). The district court ordered Central States to return the liquidated damages Lady Baltimore had paid in *Lady Baltimore I*, but allowed Central States to keep the attorney's fees it had received.

On June 19, 1991 Central States appealed the district court's decision to the United States Court of Appeals for the Seventh Circuit. On April 1, 1992 the Seventh Circuit affirmed the district court's conclusion that the Amendment was constitutional, but reversed the district court's conclusion that Lady Baltimore was entitled to a return of the liquidated damages paid to Central States in *Lady Baltimore I* (Appendix, pp. 15a-16a).[2]

Summary of Reasons For Denying the Writ

1. The linchpin of Central States' argument is that the Amendment affects only Lady Baltimore and Central States, and therefore is "a purely private bill," that serves "a strictly private purpose" (Petition, pp. 12, 15, 16).

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[2] Lady Baltimore contends that the district court's award of liquidated damages, costs and attorneys' fees in ***Lady Baltimore I***, almost a year after Congress had adopted the Amendment, was improper.

Central States confuses effect with purpose. Congress clearly can enact legislation affecting only two entities and also be acting with a public purpose.

2. The related contention by Central States that Congress must "deal with the many, rather than the few" (Petition, p. 10) is contradicted by numerous decisions of this Court, e.g., *City of New Orleans v. Dukes*, 427 U.S. 297, 97 S.Ct. 2513 (1976); *United States v. Brown*, 381 U.S. 437, 473, 85 S.Ct. 1707, 1728 (1965) (White, J. dissenting).

3. It is Central States' burden to present facts which preclude the assumption that the Amendment rests upon some rational basis. *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 96 S.Ct. 2882 (1976); *United States v. Carolene Products Co.*, 304 U.S. 144, 58 S.Ct. 778 (1938). Central States has not met that burden.

4. Instead of meeting its burden, Central States asks this Court to ignore the fact that the legislative history of amendments to MPPAA shows that Congress, having created a somewhat draconian scheme of regulation which was retroactive in nature, thereafter had second thoughts about the effective date of MPPAA. As the district court and court of appeals correctly held, the legislative history and case law surrounding MPPAA demonstrate that in enacting the Amendment Congress was pursuing a rational, public purpose in modifying the scope of the withdrawal liability scheme established in MPPAA.

Argument

I. CENTRAL STATES HAS FAILED TO MEET ITS BURDEN OF SHOWING THAT THE AMENDMENT IS IRRATIONAL AND HAS NO PUBLIC PURPOSE.

To meet the test of substantive due process, legislation need only be rationally related to a public purpose. Moreover, "[i]t is by now well established that legislative acts adjusting the burdens and benefits of economic life come to the Court with the presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 2892 (1976).[3] The standard set forth in *Turner-Elkhorn* is the appropriate one to measure legislative action in the field of national economic and social policy, such as MPPAA. *Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d 1247, 1265 (7th Cir. 1983) *cert. den.* 467 U.S. 1259, 104 S.Ct. 3554 (1984).

It is also Central State's burden to establish that "in the light of the facts made known or generally assumed"

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[3] While Lady Baltimore agrees with the Seventh Circuit's conclusion that this Court's decisions "impose an extraordinary and perhaps insuperable burden on an individual or firm that challenges the constitutionality of a statute merely because it lacks any perceptible connection to a tenable conception of the public welfare" (Appendix p. 7a), the broader question of whether economic legislation "can ever flunk the rationality test" (Appendix, p. 7a) is not presented by these facts.

the Amendment "is of such a character as to preclude the assumption that it rests upon some rational basis." *United States v. Carolene Products Co.*, 304 U.S. 144, 152, 58 S.Ct. 778, 783 (1938).

The only "fact" which Central States presents to satisfy that burden is the assertion that the Amendment is a private act. This Court has long noted that the Constitution does not prohibit Congress from passing private acts that affect specific individuals. *United States v. Brown*, 381 U.S. 437, 473, 85 S.Ct. 1707, 1728 (1965) (White, J. dissenting); *Paramino Lumber Co. v. Marshall*, 309 U.S. 370, 60 S.Ct. 600 (1940).

Central State's argument that the rationality of legislation is determined by the number of entities it affects has been rejected by this Court. In *City of New Orleans v. Dukes*, 427 U.S. 297, 97 S.Ct. 2513 (1976), the Court considered the constitutionality of a New Orleans ordinance prohibiting pushcart food sales in the French Quarter, except for vendors who had operated there for at least eight years. There were only two such vendors. The remaining vendors, banned from the French Quarter by the ordinance, filed suit. In upholding the constitutionality of the ordinance, the Court held:

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.

427 U.S. at 308, 96 S.Ct. at 2516-17.

In *City of New Orleans, supra,* the Supreme Court expressly overruled *Morey v. Dowd,* 354 U.S. 457, 77 S.Ct. 1344 (1957). In *Morey* the Court had found unconstitutional a currency exchange regulatory statute that specifically excluded the American Express Company from its prohibitions. Justice Frankfurter dissented:

> Sociologically one may think what one may of the state's recognition of the special financial position obviously enjoyed by the American Express Company. Whatever one may think is none of this court's business. In applying the Equal Protection Clause, we must be fastidiously careful to observe the admonition of Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardoza that we do not sit as a superlegislature.

354 U.S. at 475, 77 S.Ct. at 1355. In *City of New Orleans,* the Supreme Court rejected the *Morey* analysis and embraced Justice Frankfurter's criticism.

The fact that legislation advantages or adversely affects only one entity does not destroy the constitutional presumption, nor is it inconsistent with a rational purpose. Such a situation was addressed in *Main Central Railway Co. v. Brotherhood of Maintenance Way Employees,* 813 F.2d 484 (lst Cir. 1987), *cert. den.,* 484 U.S. 825, 108 S.Ct. 91 (1987). Main Central and the labor union representing its employees had bargained to impasse. Section 160 of the Railway Labor Act, (45 U.S.C. § 160), prohibited the parties from changing the conditions out of which the dispute arose until after a 30-day cooling off period. The cooling off period expired and Main Central unilaterally instituted new work rules and reduced wages.

On August 12, 1986 Congress enacted a "Joint Resolution to provide for a temporary prohibition of strikes or lockouts with respect to the Main Central Railroad Company and Portland Terminal Company labor-management dispute." Act of August 21, 1986, Pub. L. No. 99-385, 100 Stat. 819. The impact of that Act was to require Main Central to revert to its earlier wages and working conditions. The district court dismissed Main Central's complaint and Main Central appealed.

The First Circuit, citing *City of New Orleans v. Dukes, supra*, held that the test of constitutionality remained one of rationality regardless of the number of parties affected by the legislation, and that "a classification does not become irrational or unconstitutional solely because it is specific." 813 F.2d at 490. The court noted that even when legislation specifically names the single party adversely affected, it is still "subject only to the qualification that it must be rationally related to a legitimate state interest." 813 F.2d at 491, quoting *City of New Orleans v. Dukes, supra*, 427 U.S. at 303, 96 S.Ct. at 2516.

Main Central argued that there no doubt were hundreds of active railroad labor disputes, and that Congress could not constitutionally impose an additional cooling off period in only one of them. The court disagreed, noting that "[i]t was the Main Central-BMWE dispute that in Congress' judgment was threatening to disrupt interstate commerce. This is not arbitrary or irrational. . . . " 813 F.2d at 492.

Central States confuses purpose with effect. Legislation can have a rational public purpose, that is, be enacted based upon a rational view of the appropriate

scope of a scheme of regulation, irrespective of the number of entities it might affect.

While it is not Lady Baltimore's burden to show that the Amendment is rationally related to a public purpose, both the district court and the Seventh Circuit correctly noted that the legislative and case law history surrounding MPPAA demonstrate that Congress was pursuing a rational, public purpose in modifying, through the Amendment, the scheme of withdrawal liability established in MPPAA (Appendix, pp. 8a-9a, 17a-28a).

The withdrawal liability scheme enacted by Congress clearly benefitted multiemployer pension funds at the expense of contributing employers. As this Court noted in upholding the constitutionality of MPPAA, "[i]n the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others." *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 222-23, 106 S.Ct. 1018, 1025 (1986).

Having exercised its constitutional power to create withdrawal liability and to do so retroactively, *see Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 104 S.Ct. 2709 (1984), Congress then began modifying that scheme. Congress eliminated retroactive withdrawal liability under MPPAA when it adopted Section 558 of the Deficit Reduction Act of 1984 (noted at 29 U.S.C. § 1381). In *Long Island Oil Products Co. v. Local 553 Pension Fund*, 775 F.2d 24 (2nd Cir. 1985), the pension fund contended that Section 558 was unconstitutional because it retroactively and irrationally deprived it of anticipated withdrawal liability payments from an employer who had withdrawn between April and September of 1980.

The Second Circuit noted that Congress had concluded retroactive application, which had been thought necessary to prevent withdrawals in anticipation of MPPAA, had an unduly burdensome effect on employers who withdrew between April and September 1980. Congress also decided that, far from withdrawing in anticipation of the enactment of MPPAA, many employers who withdrew during the retroactivity period were surprised by its enactment. *Id.* at 28. The court concluded that:

> Congress has vast discretion when adjusting and distributing the economic benefits and burdens relating to employers, plans and a government agency. It is not our task to decide who should receive what benefit, and at whose expense. *Congress singled out a group of employers who were treated unfairly under the provisions of a previous Act. That determination seems reasonable. Congress acted to correct this perceived inequity.* Again, the remedy chosen appears reasonable. Such legislation may not be stricken simply because it arguably shifts some burdens to multiemployer plans, other employers, and the PBGC; nor should a court consider itself a "super-legislature" and reevaluate the balance that Congress has struck.

Long Island Oil Products Co. v. Local 553 Pension Fund, supra, at 29 (emphasis added).

The rationale articulated in *Long Island Oil Products Co.* applies here. Certainly Lady Baltimore did not withdraw from Central States in anticipation of or in an attempt to avoid the provisions of MPPAA. The 1979

Agreement was executed even prior to the date (February 27, 1979) that the PBGC submitted the recommendations to Congress that ultimately resulted in the passage of MPPAA in September of 1980. If Congress could rationally decide to eliminate withdrawal liability for employers who withdrew from April to September of 1980, it certainly could act rationally by eliminating that liability for any employer who agreed in January of 1979 to withdraw at a subsequent date.

Congress further adjusted the effective date for the imposition of withdrawal liability for certain employers who had binding agreements to withdraw which were entered into before September 26, 1980. In subsection (d) of Section 558 of DEFRA Congress adopted what is entitled a "special rule for certain binding agreements." That rule is: "In the case of an employer who, on September 26, 1980, has a binding agreement to withdraw from a multiemployer plan, subsection (a)(1) shall be applied by substituting 'December 31, 1980' for 'September 16, 1980'." Pub. L. No. 98-369, § 588(d), 98 Stat. 899 (July 18, 1984); 29 U.S.C. § 1381, note.

The facts in this case are not meaningfully distinguishable. The 1979 Agreement was a binding agreement to withdraw entered into prior to September 26, 1980. But for the fact that its actual withdrawal occurred after December 31, 1980, Section 558(d) of DEFRA would have voided Lady Baltimore's withdrawal liability.

The Amendment simply amplifies the provisions of Section 558(d) of DEFRA by eliminating withdrawal liability for one or more employers with binding agreements before September 26, 1980 whose withdrawal

occurred after December 31, 1980. The congressional intent, throughout, has been to ease the transition into a system of withdrawal liability by exempting employers from coverage if they either withdrew or had binding agreements to withdraw prior to September of 1980.

As this Court noted in *Connolly v. Pension Benefit Guaranty Corp., supra,* "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." 475 U.S. at 227, 106 S.Ct. at 1027, quoting *FHA v. The Darlington, Inc.*, 53 U.S. 84, 91, 79 S.Ct. 141, 146 (1958). Nor can Central States object that the corrective step taken in the Amendment is a smaller step than that taken by Congress when it adopted Section 558(d) of DEFRA. Congress is entitled to "take one step at a time," *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489, 75 S.Ct. 461, 465 (1955) and need not "strike at all evils at the same time." *Semler v. Dental Examiners*, 294 U.S. 608, 610, 55 S.Ct. 570, 571 (1935). The fact that the Amendment did not define the "affected class at a greater level of generality" is immaterial. *See Nixon v. Administrator of General Services*, 433 U.S. 425, 471, 79 S.Ct. 2781, 2804 (1977). Whatever its degree of specificity, the Amendment is "merely an extension to a constitutionally valid scheme." *Main Central Railway Co. v. BMWE, supra,* 813 F.2d at 493.

After reviewing the post-MPPAA legislative history, including Section 558(d) of DEFRA, the district court in *Lady Baltimore II* held:

> This provision [Section 558(d) of DEFRA], like the subsequent Amendment that we examined, addressed admittedly narrow situations, but ones the Congress could rationally have decided

> required correction in light of Congress' decision to change the retroactive application of MPPAA. . . .

The Seventh Circuit also found that there is nothing whatsoever suspect in the specific classification adopted by Congress here:

> By Section 558(a) of the Deficit Reduction Act of 1984, Congress eliminated withdrawal liability for employers who had withdrawn from ERISA plans between April and September 1980. And later it allowed employers who were parties to binding withdrawal agreements to escape withdrawal liability even if their withdrawal had not taken effect until the end of 1980. See Historical Note to 29 U.S.C. § 1381. These enactments – which while eliminating the most conspicuous retroactive features of the Act failed to benefit Lady Baltimore because it had withdrawn from its ERISA pension plan after 1980 – suggest that Lady Baltimore has a claim for relief that goes beyond friendship with powerful legislators. *For all we know it is the only employer to have fallen through the cracks in the amendatory legislation,* the validity of which is not questioned.

Appendix 8a-9a (Emphasis Added).

It is worth noting that Congress was aware of and may have considered Central State's actions as a further rationale for the Amendment. For example, Central States knew that the 1979 Agreement provided for a complete cessation of all obligations to it as of January 12, 1982, and initially refused to accept contributions from Lady Baltimore. However, in December 1980 it changed its position and accepted contributions without protest or reservation of rights. Central States also accepted Lady

Baltimore's restrictively endorsed check as full payment of all obligations.

Congress may also have recognized that Lady Baltimore had already paid far more than its fair share to Central States. The actuarial value of Lady Baltimore's contributions, even prior to the date that the Amendment was adopted, was more than double the amount that Central States could ever reasonably be expected to pay out in pension benefits to the small number of Lady Baltimore employees who were vested in benefits.

Indeed, Congress might well have agreed with Lady Baltimore's contention in *Lady Baltimore I* that imposition of withdrawal liability under these circumstances was not what Congress had initially intended, and would violate substantive due process. As Justice O'Connor noted in her concurring opinion in *Connolly v. Pension Benefit Guaranty Corp., supra,* the Court was not in that case upholding the constitutionality of MPPAA as applied to situations where "an employer may be liable to the plan for substantial sums even though that employer's contributions plus its allocable share of plan earnings *exceed* the present value of all benefits accrued by its employees." 475 U.S. 236, 106 S.Ct. 1032 (emphasis in original).[4]

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[4] Justice O'Connor's views may well have attracted additional support on the Court. C*f*, ***Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California,*** No. 91-904 (U.S.) (Pet. granted May 26, 1992). The suggestion by Central States that the granting of the petition in ***Concrete Pipe*** forms the basis for granting the

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As noted above, it is Central States' burden to present facts which preclude the assumption that the Amendment rests upon some rational basis. Central States cannot meet that burden by advancing the demonstrably false notion that Congress can have a public purpose only if its actions affect a group, and by ignoring the clear legislative history which shows that Congress had second thoughts about applying MPPAA retroactively or to employers who had a binding agreement to withdraw prior to its enactment.

The district court correctly held that "[w]e are not prepared to *presume* that this narrowly-tailored provision is irrational and arbitrary. Indeed, we are obliged to do just the opposite" (Appendix p. 29a). As the Seventh Circuit properly noted:

> To say that Congress cannot honor an equitable claim for exemption from a harsh law merely because it is the claim of only one firm – that a federal statute cannot have but one beneficiary – would be tantamount to ruling private bills unconstitutional . . . Furthermore, the interference with economic freedom here – the interest

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current petition (Petition, pp. 19, 21) is misplaced. If the Court in ***Concrete Pipe*** holds that MPPAA is constitutional as applied to employers whose contributions far exceeded the vested benefits of its employees, that holding would have no impact upon the facts presented here. We do respectfully submit that if the Court is otherwise disposed to grant the present petition, it should delay in doing so on the ground that a holding in ***Concrete Pipe*** that MPPAA is unconstitutional as applied would render the present petition moot.

> that underlies the "liberty of contract" jurisprudence that Central States' complaint evokes – is not the exemption of Lady Baltimore from the Multiemployer Pension Plan Amendments Act; it is the Act itself . . . Not the Act, but the Amendment to the Act exempting Lady Baltimore, does homage to liberty of contract. It restores contractual rights infringed by the Act that it amended. We cannot divine what constitutional policy would be furthered by invalidating the Amendment.

Appendix, p. 9a.

II. THE SEVENTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THIS COURT'S EQUAL PROTECTION DECISIONS.

Central States cites *City of New Orleans v. Dukes, supra,* for the proposition that the equal protection clause requires "that the classification challenge be rationally related to a legitimate state interest" (Petition, p. 20). As noted above, *City of New Orleans v. Dukes* contradicts the argument that a classification which contains only one or two entities cannot be rationally related to a legitimate state interest. The size of the classification has no bearing whatsoever upon the existence of a "legitimate state interest." The district court below dealt with Central States' arguments rather summarily:

> Economic legislation "that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose." *Hodel v. Indiana,* 452 U.S. 314, 331 (1981). The

> *Hodel* Court went on to say that a provision will fail under this analysis if its "treatment of different groups of persons is so unrelated to the achievement of any combination of legitimate purpose that (a court) can only conclude that the legislature's actions were irrational." *Id.* As in due process analysis, "such legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness or irrationality." *Id.* at 331-32. Again, we cannot say that Congress' move to adjust the provisions of MPPAA is so irrational and arbitrary as to fall outside of that body's legitimate purpose in shifting economic burdens." Appendix, pp. 29-30a.

The contention by Central States – not presented to the district court or the Seventh Circuit – that "Congress created a special benefit for Lady Baltimore that other similarly situated companies did not receive, and singled out Central States alone to pay it" (Petition, p. 21) is unsupported by any reference to the record and is simply incorrect. It may be correct that "a typical collective bargaining agreement extends for three years" and that any employer could "foresee the termination of its contractual obligation to contribute by 1983 unless it was further (voluntarily) extended" (Petition, p. 20). Those "facts," if true, do not begin to reach the situation involving Lady Baltimore.

The 1979 Agreement was a binding agreement to withdraw in January of 1982.[5] An employer with a pre-

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[5] This was an agreement to make a mid-term modification, as the contract between Lady Baltimore and the Union did not

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MPPAA binding agreement to withdraw is clearly distinguishable from an employer who could foresee in 1979 that its labor agreement was going to expire in 1983. Indeed, under the National Labor Relations Act the expiration of a contract does not justify termination of fringe benefit contributions. *NLRB v. Katz*, 369 U.S. 736, 82 S.Ct. 1107 (1962); *Hinson v. NLRB*, 428 F.2d 133, 136 (8th Cir. 1970).

The Seventh Circuit correctly noted that employers who had binding agreements to withdraw entered into prior to the adoption of MPPAA are a class whom Congress could rationally decide to exempt from MPPAA coverage (Appendix, pp. 8a-9a). It is within that class of employers that the Amendment clearly falls:

> We could not pronounce the adjustment in liabilities brought about by the Lady Baltimore Amendment irrational in a constitutional sense unless conceivably we were pointed to other employers in the identical situation as Lady Baltimore yet stuck with withdrawal liability. That would be a test of the continued vitality of the rationality standard in the sphere of economic regulations. But Central States points to no employers comparable (let alone identical) to Lady Baltimore yet subject to withdrawal liability. If a statute of general application fits all firms within its scope but one, the exemption of

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expire until May of 1982. Contrary to Central States' assertions, Lady Baltimore could not have avoided a withdrawal "by extending its contract." (Petition pp. 20-21) Contributions under the contract had ceased in January of 1982, four months before the 1979 Agreement expired.

> that one would not be irrational. We cannot say that this is not the case here, because Central States has offered no evidence or even argument to make us think otherwise and also because Lady Baltimore was not the first firm to win a congressional reprieve from withdrawal liability.

(Appendix, p. 8a).

While Central States may believe that Congress was wrong in exempting Lady Baltimore, equal protection analysis requires only that "the question is at least debatable." *United States v. Carolene Products Co., supra,* 304 U.S. at 154, 58 S.Ct. at 784. *See also, Minnesota v. Cloverleaf Creamery Co.,* 449 U.S. 456, 101 S.Ct. 715 (1981) and cases cited therein. Congress clearly found the issue debatable, both in Section 558 of DEFRA and in the Amendment.

III. THE SEVENTH CIRCUIT'S DECISION IS NOT IN CONFLECT WITH THIS COURT'S TAKING CLAUSE DECISIONS.

The district court correctly noted that this Court has "rejected the argument that MPPAA withdrawal liability is a prohibited taking" (Appendix, p. 31a). The court quoted from *Connolly v. Pension Benefit Guaranty Corp.,* 475 U.S. 211, 223, 106 S.Ct. 1018, 1025 (1986), as follows:

> In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others . . . Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation

> requires one person to use his or her assets for the benefit of another (Petition, p. 31a).

The Court in *Connolly* also noted that "[l]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations . . . This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." *Id.* at 223, quoting from *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, at 15-16, 96 S.Ct. 2882 at 2892-2893 (1976).

It would be anomalous indeed to conclude that while the imposition of withdrawal liability did not constitute a taking, relief from the imposition of such liability does. Central States' Petition does not even attempt to distinguish this Court's decisions in *Connolly* or in *Turner-Elkhorn*.[6] Instead, Central States quotes from *Webb's*

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[6] *Connolly* identified three factors which have "particular significance" in determining whether there has been a taking: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action (475 U.S. at 225, 106 S.Ct. at 1026).

(1) The economic impact of the Amendment on Central States is negligible. Central States receives millions of dollars of income daily. "Any loss to Central States will be spread among this large group of firms and workers, with the Pension Benefit Guaranty Corporation and ultimately the federal taxpayer in the background to ensure the vested pension rights of participants in Central States plans" (Appendix, p. 10a). Moreover, Central States has already benefited monetarily by its relationship with Lady Baltimore. The present value of Lady Baltimore's previous contributions to Central States is approximately double the amount of money that Central States will

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Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 101 S.Ct. 446 (1980), a case involving interest accruing on an interpleader fund deposited in the registry of a Florida county court.

Central States has apparently abandoned the argument, advanced to the Seventh Circuit, that its right to retain Lady Baltimore's money had been reduced to a final judgment. Instead, Central States now argues that "29 U.S.C. § 1381 created Central States' property interest in Lady Baltimore's withdrawal liability upon Lady Baltimore's withdrawal" (Petition, p. 23). Central States cites no authority for the proposition that 29 U.S.C. § 1381 creates a property interest within the meanings of the Takings Clause, and makes no effort to distinguish *Connolly v. Pension Benefit Guaranty Corp.*, *Usery v. Turner-Elkhorn* or courts of appeals' cases such as *Long Island Oil Products, Inc. v. Local 553 Pension Fund, supra*. Indeed,

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ever pay out to the handful of Lady Baltimore employees who had vested benefits. (2) Nor has the Amendment interfered with Central States' distinct investment-backed expectations. As ***Connolly*** notes: "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." 475 U.S. at 227, 106 S.Ct. at 1027, quoting ***FHA v. The Darlington, Inc.***, 53 U.S. 84, 91, 79 S.Ct. 141, 146 (1958). (3) The "character of the governmental action" embodied in the Amendment is simply to add an additional employer with a pre-MPPAA binding agreement to withdraw (perhaps, as the Seventh Circuit noted, the "only employer to have fallen through the cracks in the amendatory legislation" (Appendix, p. 9a)) to the list of those previously exempted by congressional action.

Central States does not even address the fact that under the scheme created by MPPAA, Central States was receiving only *interim* withdrawal liability payments. As the Seventh Circuit noted:

> The entitlement in question is like a landlord's right in a security deposit. He can hold the money but he must give it back eventually unless some condition materializes that allows him to keep it. Central States held the interim payments only as (in effect) a bailee until its right to impose withdrawal liability on Lady Baltimore was finally adjudicated. (Appendix, p. 14a).

Conclusion

For the reasons set forth above, Central States' Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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